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No. 94-8769-CFY
Status: GRANTED

Title: Tommy L. Rutledge, Petitioner
v.
United States

Docketed:
April 3, 1995

Court: United States Court of Appeals for
the Seventh Circuit

Counsel for petitioner: Solovy, Jerold, Levenstam, Barry

Counsel for respondent: Solicitor General

| Entry | Date | Note | Proceedings and Orders |
|-------|-------------|------|---|
| 1 | Apr 3 1995 | G | Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. |
| 4 | May 3 1995 | | Order extending time to file response to petition until June 7, 1995. |
| 5 | Jun 5 1995 | | Brief of respondent United States in opposition filed. |
| 6 | Jun 8 1995 | | DISTRIBUTED. June 23, 1995 (Page 6) |
| 7 | Jun 13 1995 | X | Reply brief of petitioner filed. |
| 9 | Jun 26 1995 | | Petition GRANTED. ***** |
| 11 | Jul 26 1995 | | Order extending time to file brief of petitioner on the merits until August 25, 1995. |
| 12 | Jul 28 1995 | | Joint appendix filed. |
| 13 | Aug 25 1995 | | Brief of petitioner Tommy L. Rutledge filed. |
| 14 | Aug 29 1995 | * | Record filed. Original record proceedings U.S. Court of Appeals/Seventh Circuit and U.S.District Court/Central Dist.Ill. (BOX) |
| 15 | Sep 1 1995 | * | Record filed. SEALED record proceedings United States District Court for the Central District of Illinois (3 Envelopes). |
| 17 | Sep 19 1995 | | Order extending time to file brief of respondent on the merits until October 6, 1995. |
| 18 | Sep 28 1995 | | CIRCULATED. |
| 19 | Oct 3 1995 | | SET FOR ARGUMENT MONDAY, NOVEMBER 27, 1995. (1ST CASE). |
| 20 | Oct 6 1995 | X | Brief of respondent United States filed. |
| 21 | Nov 9 1995 | X | Reply brief of petitioner Tommy L. Rutledge filed. |
| 22 | Nov 27 1995 | | ARGUED. |

(2)

Original

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

94 - 8769

TOMMY L. RUTLEDGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment bars a court from entering judgments of conviction and imposing concurrent sentences on two separate counts in an indictment alleging, respectively, 1) that the defendant conducted a "continuing criminal enterprise" in violation of 21 U.S.C. § 848, and 2) that the defendant conspired to possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 846, where the conduct that forms the basis of the conspiracy count is identical to the conduct that establishes a necessary element in the count alleging a continuing criminal enterprise.

LIST OF PARTIES

Petitioner Tommy L. Rutledge was the only appellant in Case No. 93-1122 in the United States Court of Appeals for the Seventh Circuit. His case was consolidated on appeal with Case No. 93-2652, in which Shelly Henson was the only appellant, and Case No. 93-2653, in which Richard Hagemaster was the only appellant. Mr. Rutledge's appeal also was consolidated initially with Case No. 93-2654, in which Stan Winters was the only appellant, but that case subsequently was severed from the consolidated appeals. The United States of America was the only appellee in all of these appeals.

In the United States District Court for the Central District of Illinois, Mr. Rutledge was named as a co-defendant in a second superseding indictment with Shelly Henson, Richard Hagemaster, Stan Winters and Donald Taylor in Case No. 91 CR 40009. In a prior indictment in the same case, Mr. Rutledge had been named as a co-defendant with Roger Malott. The United States of America was the only plaintiff in that case.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

TOMMY L. RUTLEDGE,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Tommy L. Rutledge respectfully requests
that a writ of certiorari issue to review the decision of the
United States Court of Appeals for the Seventh Circuit in
this case.

OPINIONS BELOW

The district court's December 29, 1992, judgment of
conviction and sentence (Pet. App. 13-24) is unreported. The
November 10, 1994, opinion of the United States Court of
Appeals for the Seventh Circuit affirming the district
court's judgment is reported at 40 F.3d 879 (7th Cir. 1994),
and is reproduced at pages 1 to 12 of the Appendix to this
Petition.

JURISDICTION

The United States Court of Appeals for the Seventh
Circuit issued its decision of November 10, 1994. A timely
petition for rehearing and suggestion for rehearing *en banc*
was denied on January 3, 1995. The jurisdiction of this
Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States
Constitution provides in pertinent part:

. . . nor shall any person be subject for
the same offence to be twice put in
jeopardy of life or limb; . . .

The full text of 21 U.S.C. § 848 (Continuing criminal
enterprise) and 21 U.S.C. § 846 (Attempt and conspiracy) are
set forth, respectively, at pages 37 to 45 and page 46 of the
Appendix to this Petition.

STATEMENT

Petitioner Tommy L. Rutledge ("Mr. Rutledge") was
named as a defendant in a second superseding indictment (the
"indictment") filed on December 4, 1991, in the United States
District Court for the Central District of Illinois. Count 1
of the indictment alleged that Mr. Rutledge "knowingly and
intentionally did engage in a continuing criminal enterprise,
namely a series of violations of Title 21, United States
Code, Sections 841(a)(1) and 846" and that such conduct was
"[i]n violation of Title 21, United States Code, Section

848." (Pet. App. 26a-27a.) Count 2 of the indictment alleged that Mr. Rutledge, along with his co-defendants, had conspired between late 1988 and mid-1990 to possess cocaine with intent to distribute "in violation of Title 21, United States Code, Section 846." (Pet. App. 27a-28a.)^{1/} A jury trial commenced on June 16, 1992, and on June 25, 1992, the jury returned a verdict of guilty against Mr. Rutledge on all counts of the indictment. On December 29, 1992, Mr. Rutledge was sentenced, *inter alia*, to serve a prison term of life on the conviction under Count 1 of the indictment, and a prison term of life without possible release on Count 2 of the indictment. The judgment of the district court specified that the separate life sentences under Count 1 and Count 2 of the indictment would run concurrently. (Pet. App. 14.)

Mr. Rutledge appealed. He argued that both the entry of judgments of conviction and the imposition of concurrent sentences on both the continuing criminal enterprise ("CCE") charged in Count 1 and the conspiracy charged in Count 2 violated the Double Jeopardy Clause of the Fifth Amendment. (Pet. App. 9a.)^{2/} The court of appeals,

while agreeing that "the conspiracy charge is a lesser included offense of the CCE charge", rejected Mr. Rutledge's Double Jeopardy Clause argument by adhering to its previously stated position that "[c]oncurrent sentences may be imposed for conspiracy and CCE provided the cumulative punishment does not exceed the maximum under the CCE Act." (Pet. App. 9a, citing United States v. Bafia, 949 F.2d 1465, 1473 (7th Cir. 1991) and United States v. Bond, 847 F.2d 1233, 1239 (7th Cir. 1988).) The court of appeals affirmed Mr. Rutledge's convictions and sentences in their entirety.

REASONS FOR GRANTING THE WRIT

This Court should review the decision below to assess the Seventh Circuit's practice of allowing the entry of judgments of conviction and the imposition of concurrent sentences on CCE and conspiracy counts even where, as was admittedly the case here, the conduct charged in the conspiracy count is also a necessary element with respect to the CCE count. See Pet. App. 9a (Seventh Circuit agreeing that "the conspiracy charge is a lesser included offense of the CCE charge"). That practice follows from the Seventh Circuit's view that the Double Jeopardy Clause's protection against "multiple punishments for the same offense", North Carolina v. Pearce, 395 U.S. 711, 717 (1969), is not implicated in the context of concurrent sentences on CCE and conspiracy counts so long as the total length of the sentences does not exceed the maximum authorized under one of

^{1/} The indictment also charged Mr. Rutledge with possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (Count 3), possession of a firearm after conviction of a felony in violation of 18 U.S.C. § 922(g) (Count 4), and carrying and using a firearm in relation to a drug trafficking offense in violation of 18 U.S.C. 924(c) (Counts 5 and 6). (Pet. App. 28a-30a.) No questions are presented with respect to those counts in this Petition.

^{2/} Mr. Rutledge raised other errors with respect to both his trial and his sentencing. (Pet. App. 5a-9a.) Those other claims are not the subject of this Petition.

the offenses of conviction. (Pet. App. 9a.) The Seventh Circuit's practice is contrary to the express teachings of this Court, as properly interpreted by nine circuit courts of appeals. Those courts prohibit even the entry of judgments of conviction on both CCE and conspiracy counts. The Seventh Circuit's view also is contrary to the position of the Solicitor General's Office as expressed to this Court only two terms ago in Mohwish v. United States, 113 S. Ct. 1378 (1993), vacating and remanding United States v. Patrick, 965 F.2d 1390 (6th Cir. 1992), on remand, 993 F.2d 123, 124 (6th Cir. 1993) (in case involving concurrent CCE and conspiracy sentences, Court granted certiorari and vacated judgment of court of appeals for remand in light of position of Acting Solicitor General; on remand, court of appeals "correct[ed] the oversight" by ordering district court to vacate the conspiracy conviction). As explained more fully below, the Seventh Circuit's erroneous practice appears to proceed from a mistaken belief that this Court's opinion in Garrett v. United States, 471 U.S. 773 (1985) modified this Court's views as stated in Jeffers v. United States, 432 U.S. 137 (1977).

The Seventh Circuit is the only court of appeals that permits the imposition of concurrent sentences on CCE and conspiracy counts. As shown below, however, two other courts of appeals -- the Second Circuit and the Third Circuit -- also reject the majority approach by permitting the entry of separate judgments of conviction on CCE and conspiracy

guilty verdicts, so long as only one sentence is imposed. This case presents an opportunity to bring the Double Jeopardy Clause jurisprudence of the courts of appeals in the minority into line with the controlling precedents of this Court and with a significant majority of the other courts of appeals. This case also provides an excellent opportunity to articulate more general principles as to the particular steps that should be taken to avoid a "multiple punishment" Double Jeopardy Clause violation in cases where a jury returns a guilty verdict on two counts for which the legislature did not intend to impose cumulative punishment.

I. THE SEVENTH CIRCUIT'S PRACTICE OF ALLOWING ENTRY OF JUDGMENTS OF CONVICTION AND CONCURRENT SENTENCES ON CCE AND CONSPIRACY VERDICTS IS IN CONFLICT WITH THE PRACTICE ADOPTED BY MOST CIRCUITS AS A CONSEQUENCE OF THIS COURT'S DECISION IN JEFFERS V. UNITED STATES AND BALL V. UNITED STATES.

In this case, as in all cases raising questions relating to the multiple punishments protection of the Double Jeopardy Clause, the threshold question is whether the legislature intended to impose cumulative punishment upon a finding of guilt of separately enumerated offenses. Garrett v. United States, 471 U.S. 773, 778 (1985). This Court has already answered that question with respect to 21 U.S.C. § 848 (CCE) and 21 U.S.C. § 846 (conspiracy). In Jeffers v. United States, 432 U.S. 137, 155-56 (1977), Justice Blackmun, writing for a four-judge plurality, concluded that Congress did not intend "to allow cumulative punishment for violations

of §§ 846 and 848."^{3/} The concurring opinion of Justice Stevens, joined by the remaining three justices who heard the case, agreed with the plurality that cumulative punishment may not be imposed for violations of §§ 848 and 846. Id. at 160. Thus it was the unanimous conclusion of the Court that, because of Congress's intent, the Double Jeopardy Clause bars cumulative punishment for CCE and conspiracy violations.

Given that Congress did not intend to impose cumulative punishment for CCE and conspiracy violations, the Double Jeopardy Clause bars the imposition of concurrent sentences on both counts, and even the entry of judgments of conviction on both verdicts. That conclusion follows from this Court's decision in Ball v. United States, 470 U.S. 856 (1985). In Ball, this Court held that Congress did not intend to allow cumulative punishment for the same conduct that resulted in separate violations of statutes prohibiting receiving a firearm (18 U.S.C. § 922(h)(1)) and possessing the same firearm (18 U.S.C. § 1202 (a)(1)). Id. at 865. Accordingly, the Court held without dissent that "the second conviction, even if it results in no greater sentence, is an impermissible punishment." Id. at 865 (emphasis supplied); see also id. at 864-65 ("[t]he second conviction, whose

concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence"). The Court did expressly permit multiple-count indictments and submission to the jury of separate counts alleging separate offenses for which Congress intended no cumulative punishment. But the Court held that the Double Jeopardy Clause requires that the line be drawn at the return of a guilty verdict. Judgment may not be entered on both verdicts unless the legislature intends to allow separate punishment. A fortiori, the Double Jeopardy Clause proscribes concurrent sentences where such intent is lacking.

Recognizing that Jeffers and Ball combine to foreclose the imposition of concurrent sentences, or even entry of judgments of conviction, on both CCE and conspiracy verdicts, nine courts of appeals have so held expressly. See, e.g., United States v. Rivera-Martinez, 931 F.2d 148, 152-53 (1st Cir. 1991), cert. denied, 502 U.S. 862 (1991); United States v. Butler, 885 F.2d 195, 201-202 (4th Cir. 1989); United States v. Neal, 27 F.3d 1035, 1054 (5th Cir. 1994), cert. denied, 1155 S. Ct. 1165 (1995); United States v. Paulino, 935 F.2d 739, 751 (6th Cir.), cert. denied, 112 S. Ct. 315 (1991); United States v. Possick, 849 F.2d 332, 341 (8th Cir. 1988); United States v. Hernandez-Escarsega, 886 F.2d 1560, 1582 (9th Cir. 1989), cert. denied, 497 U.S. 1003 (1990); United States v. Stallings, 810 F.2d 973, 975-76

^{3/} The basis of this conclusion was that both statutes are directed at the incremental harm associated with concerted activity in the area of narcotics trafficking. 432 U.S. at 157. See infra 11-12 (showing that similar analysis does not apply to substantive offenses, thus distinguishing this Court's holding in Garrett v. United States, 471 U.S. 773 (1985), on which the Seventh Circuit has erroneously relied in the CCE/conspiracy context.)

(10th Cir. 1990); United States v. Cruz, 805 F.2d 1464, 1479 (11th Cir. 1986), cert. denied, 481 U.S. 1006 (1987).^{4/}

The Seventh Circuit, on the other hand, has rejected this logical constitutional analysis in recent years, and now permits the imposition of concurrent sentences for CCE and conspiracy violations. That was not always the case. In United States v. Jefferson, 714 F.2d 689, 705 (7th Cir. 1983) ("Jefferson I"), the Seventh Circuit vacated and remanded a district court's imposition of consecutive sentences for CCE and substantive drug violations, while affirming the underlying convictions. The Seventh Circuit, relying on Jeffers, also ordered the district court to vacate both the defendant's conspiracy conviction and her sentence under 21 U.S.C. § 846 because the conspiracy conviction and

^{4/} The District of Columbia Circuit reached the same conclusion in United States v. Anderson, 39 F.3d 331, 357 (D.C. Cir. 1994). On February 9, 1995, the District of Columbia Circuit granted a suggestion for rehearing en banc and vacated the panel opinion in Anderson. 39 F.3d at 361. The en banc rehearing will address the unrelated question of whether a defendant may be convicted of multiple violations of 18 U.S.C. 924(c)(1) when the government proves only one crime of violence or drug trafficking. See *id.* at 359 (dissent of Silberman, J.); see also United States v. Anderson, 1995 WL 79398 (D.C. Cir. Feb. 14, 1995) (order specifying issue to be briefed on rehearing en banc). Even before this Court's opinion in Ball, the District of Columbia Circuit and a number of other courts of appeals had ruled that the Double Jeopardy Clause bars both entry of judgment and imposition of concurrent sentences on separate CCE and conspiracy counts. See, e.g., United States v. Smith, 703 F.2d 627, 628 (D.C. Cir. 1983); United States v. Webster, 639 F.2d 174, 182 (4th Cir.) cert. denied, 454 U.S. 857 (1981); United States v. Michel, 588 F.2d 986, 1001 (5th Cir.), cert. denied, 444 U.S. 825 (1979); United States v. Dickey, 736 F.2d 571, 596-97 (10th Cir. 1984), cert. denied, 469 U.S. 1188 (1985); United States v. Graziano, 710 F.2d 691, 699 (11th Cir. 1983), cert. denied, 466 U.S. 937 (1984).

sentence were impermissibly cumulative in light of the defendant's CCE conviction and sentence under 21 U.S.C. § 848. *Id.* at 705-06. On a second appeal, after the remand to the district court, the Seventh Circuit affirmed concurrent sentences imposed upon entry of judgment on both CCE and substantive offenses. United States v. Jefferson, 760 F.2d 821 (7th Cir. 1985) ("Jefferson II"). This Court granted a petition for a writ of certiorari and vacated and remanded Jefferson II for reconsideration in light of Garrett v. United States, 471 U.S. 773 (1985). Jefferson v. United States, 474 U.S. 806 (1985). In Garrett, this Court held that cumulative sentences were permissible for CCE violations and substantive controlled substance offenses under 21 U.S.C. § 841(b)(1)(a). *Id.* at 794. There, this Court expressly approved the plurality opinion in Jeffers insofar as it held that cumulative penalties may not, consistent with the protections of the Double Jeopardy Clause, be imposed on guilty verdicts on CCE and conspiracy counts. *Id.*

Garrett thus expressly reaffirmed the proscription of cumulative penalties for CCE and conspiracy violations.^{5/} The implication of this Court's decision to vacate and remand Jefferson II therefore was that, while it was proper to impose cumulative punishment for CCE and substantive drug offenses, separate judgments of conviction on CCE and

^{5/} Garrett also was decided after Ball, 470 U.S. 856 (1985), which held that separate judgments of conviction cannot be entered on separate counts for which the legislature did not intend cumulative punishment.

conspiracy counts were forbidden by the Double Jeopardy Clause. The Seventh Circuit, however, misinterpreted the remand order in Jefferson II and went in exactly the opposite, and wrong, direction after this Court vacated and remanded Jefferson II. Instead of standing by its original decision to vacate the conspiracy conviction in Jefferson I -- as it should have in light of Jeffers, Ball, and Garrett -- the Seventh Circuit ordered the district court to reinstate the original sentence, which, as noted above, included sentences on both the CCE and conspiracy counts. United States v. Jefferson, 782 F.2d 697, 707 (7th Cir. 1986).

The Seventh Circuit apparently believes that Garrett somehow altered the principle articulated in Jeffers -- rather than reaffirmed its holding in the conspiracy context -- possibly because the Seventh Circuit believes, erroneously, that Garrett involved a conspiracy conviction, when in fact a substantive offense was at issue. See United States v. Bafia, 949 F.2d 1465, 1472 (7th Cir. 1991), cert. denied, 112 S. Ct. 1989 (1992) (claiming that Supreme Court "affirmed Garrett's sentence which included concurrent sentences for CCE and conspiracy convictions"). The Seventh Circuit has misread Garrett and incorrectly equated substantive offenses and conspiracy in the CCE context for purposes of Double Jeopardy Clause analysis. As noted above (pp. 6-7), the basis for the finding in Jeffers that Congress did not intend cumulative punishment for CCE and conspiracy violations was that both statutes are aimed at the

"additional dangers posed by concerted activity." Jeffers, 432 U.S. at 157. There is, however, no such duplication between the purposes of substantive drug offenses and the proscription of continuing criminal enterprises found in 21 U.S.C. § 848, the CCE statute. Jeffers and Garrett are completely consistent.

Not surprisingly, therefore, no less than nine courts of appeals have held after this Court's decision in Garrett that Jeffers remains good law, and that the Double Jeopardy Clause forbids the entry of judgments of conviction, and consequently the imposition of even a concurrent sentence, for both CCE and conspiracy violations. See supra 8-9. On the other hand, two courts of appeals besides the Seventh Circuit have failed to adopt the majority approach. The Second Circuit and the Third Circuit both permit the entry judgment on CCE and conspiracy counts, although those courts do not go as far as the Seventh Circuit does in allowing the imposition of concurrent sentences. See United States v. Alvaro, 771 F.2d 621, 632-35 (2d Cir. 1985); United States v. Fernandez, 916 F.2d 125, 128-29 (3d Cir. 1990), cert. denied, 500 U.S. 984 (1991). This Court should resolve the manifest dispute between these three courts of appeals and the majority.

The Seventh Circuit's continued adherence to its minority position is particularly puzzling in light of this Court's recent action in Mohwish v. United States, 113 S. Ct. 1378 (1993). In Mohwish the Sixth Circuit had mistakenly

failed to vacate a conspiracy conviction under 21 U.S.C. § 846 in a case where the defendant had also been sentenced on a CCE count. United States v. Mohwish, 965 F.2d 1390 (6th Cir. 1992). The defendant petitioned this Court for certiorari. The Acting Solicitor General submitted a brief which endorsed the majority view as to the proper manner in which to proceed upon a finding of guilt on both conspiracy and CCE counts:

. . . Congress did not intend to permit cumulative punishment for participating in a drug conspiracy and engaging in a continuing criminal enterprise, at least where the evidence supporting the "in concert" element of the CCE offense is essentially indistinguishable from the evidence supporting the drug conspiracy charge. See Garrett v. United States, 471 U.S. 773, 794 (1985); Jeffers v. United States, 432 U.S. 137, 155 (1977) (plurality opinion). The Sixth Circuit, like a number of other courts of appeals, has determined that a drug conspiracy conviction should thus be vacated when the defendant is also convicted on a CCE count.

Brief for United States at 14, Mohwish v. United States, 113 S. Ct. 1378 (1993) (No. 92-282).

This Court granted certiorari in Mohwish, vacated the Sixth Circuit's judgment, and remanded for further consideration in light of the Acting Solicitor General's position. On remand the Sixth Circuit recognized its mistake and ordered that the defendant's conspiracy conviction be vacated. United States v. Mohwish, 993 F.2d 123, 124 (6th Cir. 1993).

Mr. Rutledge called Mohwish to the Seventh Circuit's attention twice, first in a pro se Federal Rule of Appellate Procedure 28(j) submission five weeks before the Seventh Circuit decided his case (Pet. App. 31a-33a), and again in a pro se rehearing petition. (Pet. App. 34a-36a.) On both occasions, the Seventh Circuit refused to reconsider its previously held position on the Double Jeopardy Clause issue. Indeed, the Seventh Circuit has announced that it will continue to approve entry of judgments of conviction and concurrent sentences on CCE and conspiracy counts "until the Supreme Court directs otherwise." United States v. Bafia, 949 F.2d at 1472.

Most courts of appeals have recognized that this Court has directed that judgments of conviction and concurrent sentences may not be entered on separate CCE and conspiracy verdicts in circumstances such as those present in this case. Three courts of appeals have, to varying degrees, resisted that conclusion. This Court should review the opinion below and issue a full opinion expressly directing courts of appeal in the minority to conform their approach to the requirements of the Double Jeopardy Clause. Alternatively, the Court may wish to issue a writ of certiorari, summarily vacate the judgment of the Seventh Circuit, and remand the case for reconsideration in light of Jeffers and Ball. By whatever means, this Court should now unify the practice of the courts of appeals with respect to this recurring and important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES of America, Plaintiff-Appellee,
v.
Tommy L. RUTLEDGE, Shelly Henson, and Richard Hagemaster, Defendants-Appellants.

Nos. 93-1122, 93-2652 and 93-2653.

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 9, 1994.

Decided Nov. 10, 1994.
Rehearing and Suggestion for Rehearing En Banc Denied Jan. 3, 1995 in No. 93-1122.

Defendants were convicted in the United States District Court for the Central District of Illinois, Michael M. Mihm, Chief Judge, of conspiring to distribute cocaine and one defendant was convicted of conducting a continuing criminal enterprise, distribution of cocaine, possession of a firearm by a felon, and using or carrying a firearm during the commission of a drug felony. Defendants appealed. The Court of Appeals, Bauer, Circuit Judge, held that: (1) defendant suffered no prejudice and trial court handled incident properly when two or three jurors briefly saw defendant handcuffed outside courtroom; (2) evidence was sufficient to support conviction for conspiracy to distribute cocaine; and (3) in-court identification of defendant was reliable and, thus, properly admissible.

Affirmed.

[1] CRIMINAL LAW \Leftrightarrow 1166.8
110k1166.8

Defendant suffered no prejudice when two or three jurors briefly saw defendant handcuffed outside courtroom where it was unclear whether at first glance jurors necessarily knew that defendant was handcuffed, defendant raised his handcuffed hands in exaggerated manner to show jurors handcuffs, defendant was immediately led away, trial judge offered to give jury cautioning

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instruction regarding incident, defendant, after conferring with counsel, indicated that he did not want such instruction, defendant failed to present any evidence from which it could be found that he suffered actual prejudice, and defendant did not request voir dire of jurors at time incident happened.

[2] CRIMINAL LAW \Leftrightarrow 1166.8
110k1166.8

Prejudice does not automatically inhere in trial when juror inadvertently sees defendant in handcuffs.

[3] CRIMINAL LAW \Leftrightarrow 1163(2)
110k1163(2)

Defendant, who is seen by jurors in handcuffs outside of courtroom, bears burden of proving that he suffered actual prejudice sufficient to warrant new trial.

[4] WITNESSES \Leftrightarrow 396(1)
410k396(1)

Witness' testimony regarding defendant's threats of gang retaliation was highly probative evidence explaining witness' prior inconsistent statement and trial court did not abuse its discretion in admitting testimony in drug prosecution; witness perjured himself before grand jury by denying that defendant operated drug ring out of fear of gang retaliation and government had right to rehabilitate witness by explaining prior perjury. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[5] CRIMINAL LAW \Leftrightarrow 1153(1)
110k1153(1)

Court of Appeals reviews trial court's decision to admit evidence for an abuse of trial court's discretion.

[6] CRIMINAL LAW \Leftrightarrow 986.4(3)
110k986.4(3)

Witness' statements in presentence report, describing incident in which defendant showed witness marijuana and cocaine in trunk of defendant's car and of other occasions on which witness accompanied defendant to deliver or obtain cocaine, bore sufficient indicia of reliability to be admissible, although witness did not testify at trial or



from coconspirator while living with him, helped pay bills with money she earned selling coconspirator's drugs, second witness testified that defendant sold and delivered cocaine for coconspirator and collected payment, third witness testified that defendant kept coconspirator's accounts regarding drug transactions, and fourth witness testified that defendant arranged cocaine sales for coconspirator and collected payments. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 21 U.S.C.A. §§ 846.

[11] CRIMINAL LAW \Leftrightarrow 1144.13(3)
110k1144.13(3)

When reviewing claim challenging sufficiency of the evidence, appellate court must review evidence in light most favorable to government, drawing all reasonable inferences; then, appellate court must ascertain whether any rational trier of fact could have found the essential elements of crime beyond a reasonable doubt.

[11] CRIMINAL LAW \Leftrightarrow 1144.13(5)
110k1144.13(5)

When reviewing claim challenging sufficiency of the evidence, appellate court must review evidence in light most favorable to government, drawing all reasonable inferences; then, appellate court must ascertain whether any rational trier of fact could have found the essential elements of crime beyond a reasonable doubt.

[11] CRIMINAL LAW \Leftrightarrow 1159.2(7)
110k1159.2(7)

When reviewing claim challenging sufficiency of the evidence, appellate court must review evidence in light most favorable to government, drawing all reasonable inferences; then, appellate court must ascertain whether any rational trier of fact could have found the essential elements of crime beyond a reasonable doubt.

[12] CRIMINAL LAW \Leftrightarrow 404.65
110k404.65

Pistol defendant kept in her possession was admissible in prosecution for conspiracy to distribute cocaine where district court

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provided jury with several instructions regarding limited purposes for which they could consider evidence and government properly presented evidence to demonstrate defendant's role in drug enterprise and to connect coconspirator to gun. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[12] CRIMINAL LAW ↔ 673(1)

110k673(1)

Pistol defendant kept in her possession was admissible in prosecution for conspiracy to distribute cocaine where district court provided jury with several instructions regarding limited purposes for which they could consider evidence and government properly presented evidence to demonstrate defendant's role in drug enterprise and to connect coconspirator to gun. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[13] CONSTITUTIONAL LAW ↔ 268(8)

92k268(8)

Although prosecutor's statements during closing argument in prosecution for conspiring to distribute cocaine, commenting on credibility of defense witness and that "defense should have been embarrassed to hear her say that," were improper, they did not rise to level of due process violation where they were directed at witness for codefendant and did not bear at all on evidence presented against defendant, judge quickly granted defense counsel's objection, defense counsel had ample opportunity to counter prosecutor's comments during course of her argument, and evidence was overwhelmingly against defendant. U.S.C.A. Const. Amend. 5; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[13] CRIMINAL LAW ↔ 720(5)

110k720(5)

Although prosecutor's statements during closing argument in prosecution for conspiring to distribute cocaine, commenting on credibility of defense witness and that "defense should have been embarrassed to hear her say that," were improper, they did not rise to level of due process violation where

they were directed at witness for codefendant and did not bear at all on evidence presented against defendant, judge quickly granted defense counsel's objection, defense counsel had ample opportunity to counter prosecutor's comments during course of her argument, and evidence was overwhelmingly against defendant. U.S.C.A. Const. Amend. 5; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[14] CRIMINAL LAW ↔ 1134(3)

110k1134(3)

Appellate court evaluates prosecutor's comments to determine whether they were improper; if so, a new trial is warranted only if the prosecutor's comments infected trial with unfairness as to make the resulting conviction a denial of due process. U.S.C.A. Const. Amend. 5.

[14] CRIMINAL LAW ↔ 1171.1(2.1)

110k1171.1(2.1)

Appellate court evaluates prosecutor's comments to determine whether they were improper; if so, a new trial is warranted only if the prosecutor's comments infected trial with unfairness as to make the resulting conviction a denial of due process. U.S.C.A. Const. Amend. 5.

[15] CONSPIRACY ↔ 24(1)

91k24(1)

If jury should find that particular defendant did not join in conspiracy that was charged in indictment, it must find defendant not guilty of conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[16] CRIMINAL LAW ↔ 822(1)

110k822(1)

In reviewing fitness of jury instructions to which objections were properly raised in proceedings below, appellate court must determine from looking at charge as a whole, whether jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues.

[17] CRIMINAL LAW ↔ 770(2)

110k770(2)

Defendant is not entitled to have a particular instruction presented to jury, but only to have her theory of the defense presented.

[17] CRIMINAL LAW ↔ 834(1)

110k834(1)

Defendant is not entitled to have a particular instruction presented to jury, but only to have her theory of the defense presented.

[18] CRIMINAL LAW ↔ 805(1)

110k805(1)

In matters regarding jury instructions, district court is given substantial discretion with respect to specific wording of instruction.

[19] CRIMINAL LAW ↔ 339.9(2)

110k339.9(2)

In-court identification of defendant was reliable and, thus, admissible, although lapse of time between commission of crime and trial was not insignificant, where witness testified that he spent 30 minutes with defendant in well-lighted room at time of crime, that he had ample opportunity to view defendant, witness' testimony indicated that he was quite attentive during commission of crime, and witness described defendant's vehicle and appearance in significant detail. U.S.C.A. Const. Amend. 5.

[20] CRIMINAL LAW ↔ 339.10(1)

110k339.10(1)

Admissibility of challenged in-court identification is governed by two-part test; first, appellate court must determine whether initial out-of-court identification was unduly suggestive; if so, in-court identification is inadmissible unless it is so reliable, in view of totality of the circumstances, as to prevent substantial likelihood of misidentification.

[21] CRIMINAL LAW ↔ 339.9(1)

110k339.9(1)

Reliability of in-court identification is guided by several factors: the opportunity of witness to view criminal at time of crime, witness' degree of attention, accuracy of his prior description of criminal, level of certainty demonstrated at confrontation, and time of crime and confrontation.

*881 K. Tate Chambers, Asst. U.S. Atty. (argued), Peoria, IL, for U.S.

Julia M. Gentile (argued), E.P.A., Springfield, IL, for Tommy L. Rutledge.

Spencer L. Daniels (argued), Peoria, IL, for Shelly Henson.

Jeffrey W. DeJoode (argued), March & McMillan, Macomb, IL, for Richard Hagemaster.

882 Before BAUER and FLAUM, Circuit Judges, and FOREMAN, [FN] District Judge.

FN* The Honorable James L. Foreman, of the United States District Court for the Southern District of Illinois, is sitting by designation.

BAUER, Circuit Judge.

A jury convicted Tommy Lee Rutledge, Shelly Henson, Richard Hagemaster, and Stan Winters of conspiring to distribute cocaine in violation of 21 U.S.C. § 846. Additionally, the jury convicted Rutledge of conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848, distribution of cocaine in violation of 21 U.S.C. § 841(a)(1), possession of a firearm by a felon in violation of 18 U.S.C. § 922(g), and using or carrying a firearm during the commission of a drug felony in violation of 18 U.S.C. § 924(c). Rutledge, Henson, and Hagemaster appealed citing a surfeit of defects in their collective prosecution. Because we find no merit to their arguments, we affirm.

I. Facts

In November 1986, after his release from prison, Rutledge began dealing cocaine, a formative step that would soon develop into an extensive drug distribution network. From his base in Chicago, Rutledge would travel every two weeks to Astoria, Illinois to deliver up to two ounces of cocaine to Roger Malott. Soon thereafter, Rutledge moved to Youngstown, Illinois and put Malott to work for him, delivering cocaine and collecting debts resulting from drug sales. Rutledge's



initial source of cocaine was Juan Gonzalez of Burlington, Iowa, an acquaintance of Rutledge's from prison and a member of the Latin Kings street gang based in Chicago.

Over the next several months, Rutledge convinced several people to join his enterprise, including Shelly Henson, Richard Hagemaster, Rick Bolen, Randy Mustread, Kim Mummert, Tom Crowe, and Stan Winters. At one point, to demonstrate to Bolen that he was a major drug dealer and to convince him to join his outfit, Rutledge showed Bolen fifty pounds of marijuana and one-eighth of a pound of cocaine stored in the trunk of his car.

Rutledge's methods of doing business were in many ways similar to those of his peers in the drug business. Firearms figured prominently in Rutledge's enterprise. Not only did he maintain a cache of weaponry to protect himself, his employees, and his inventory of drugs, Rutledge also trafficked in firearms. He was more than happy to trade firearms for cocaine and receive firearms in payment for cocaine shipments.

As if the constant presence of firearms was not enough, Rutledge used his connections with the Latin Kings (presumably forged during one of his stints in prison) to maintain control over his operation. He frequently invoked the name of the Latin Kings to intimidate employees and customers alike. Rutledge, however, reserved his most ominous invocation of the Latin Kings for his employees to ensure that no employee would implicate him in this drug enterprise. We will expand on Rutledge's use of this tactic shortly.

At some point during the course of his cocaine conspiracy, Rutledge changed the source of his cocaine; he began to buy cocaine from Roberto Laurel, a member of the Latin Kings in Chicago. Consistent with his modus operandi, Rutledge also traded arms with Laurel. To execute his transactions with Laurel, Rutledge would travel with, or send to Chicago in varying combinations, Malott, Mustread, Henson, and Mummert.

From November 1988 through July 1989, Rutledge's base of operations was a trailer he shared with Mummert, Henson, and Hagemaster in Youngstown. Rutledge supported these three and provided them with cocaine. At this time, Rutledge employed Malott and Crowe in addition to his roommates. Henson, however, moved out of the trailer in July 1989 and terminated her association with Rutledge.

Henson's departure was likely hastened when Rutledge was arrested in the trailer in July 1989 by the Illinois State Police on the basis of statements made by Malott that Rutledge was involved with drugs and guns. The arresting officers discovered Rutledge's *883 cache of weapons, but apparently found no drugs. When he learned of Malott's statement to the police, Rutledge threatened Malott with serious harm if Malott testified against him in court. Rutledge made similar threats to Mummert. Rutledge's intimidation succeeded; both Malott and Mummert testified before a state grand jury that Rutledge was not involved with drugs or guns. Rutledge was subsequently released.

Rutledge continued his drug operation until he was arrested by federal authorities in December 1990. Rutledge, Henson, Hagemaster, and Winters were indicted in February 1991. Malott, Mummert, Mustread, and a frequent customer of Rutledge's, Michael Wright, cooperated with the government and testified as to their experiences with Rutledge and his drug ring.

II. Analysis

A. Tommy Lee Rutledge

[1] Rutledge's first argument is that he was denied a fair trial because two or three jurors encountered Rutledge in handcuffs outside the courtroom during the course of the trial. He contends that the trial court should have voir dire'd those jurors to determine whether Rutledge was prejudiced by this incident. As we shall explain, Rutledge received a trial as fair as possible given his own conduct, and the trial court handled the situation perfectly.

On the first afternoon of the trial, Rutledge made a statement to the Deputy United States Marshals to the effect of "what if I take off now?" [FN1] While the deputies believed that Rutledge was not serious in his threat, they discussed the situation and decided that Rutledge must be handcuffed going to and from the courtroom. On the morning of the second day of the trial, the prosecutor brought this incident to the attention of the trial judge, who approved handcuffing Rutledge.

[FN1] Deputy Kevin Jackson reported that he did not recall exactly what Rutledge had said but that it was a statement similar to "what if I take off now?" or "what if I flee?"

To ensure that no jurors saw Rutledge being taken out of the courtroom in handcuffs, the deputies adopted certain procedures for bringing Rutledge in and out of the courtroom. Prior to taking Rutledge out of the courtroom, one deputy would check the outer hallway to ascertain whether any jurors were present. If the hallway was clear, the deputies would then lead Rutledge out of the courtroom into that outer hallway. Unfortunately, these measures were not foolproof.

At one point during the trial, two or three jurors briefly saw Rutledge in handcuffs. The deputies followed the procedures they had adopted for Rutledge, but the jurors entered the hallway just after it was checked. It is unclear whether at first glance the jurors necessarily knew that Rutledge was handcuffed; just to make sure that none of the jurors missed it, Rutledge raised his handcuffed hands in an exaggerated manner to show the jurors his handcuffs. Rutledge was immediately led away so that no additional jurors were treated to a similar demonstration.

The parties immediately brought this incident to the attention of the trial judge. The trial judge then offered to give the jury a cautioning instruction regarding the incident. He continued:

What I would suggest is that I simply make a statement to the jury that it has come to my attention that some of the jurors may

have become aware of the fact that he is in custody and that's a reality in this case and I will caution them that the fact that he is in custody should not in any way be considered by them as any evidence or suggestion of guilt. Is that how you want to handle it or would you suggest something else? After conferring with his client, Rutledge's counsel stated: "We would like to just skip it, your Honor."

Rutledge claims that such a sighting by jurors of a defendant in handcuffs is inherently prejudicial. Therefore, he argues that a curative instruction from the trial judge is obviously insufficient and that, in this case, the trial judge, *sua sponte*, should have voir dire'd the jurors in question. Rutledge did not request such a voir dire from the judge *884 at the time it happened. We believe this omission combined with Rutledge's failure to present any evidence from which we might find that he suffered actual prejudice resulting from this incident demonstrates that this argument lacks merit.

[2][3] While we believe that this may be the first time that we have been squarely presented with this issue, we recently noted that "[c]ourts have generally found inadvertent sightings of shackles by the jury to be insufficient to demonstrate prejudice." Woods v. Thieret, 5 F.3d 244, 248 n. 5 (7th Cir. 1993) (citing Harrell v. Israel, 672 F.2d 632, 637 (7th Cir. 1982) (citations omitted)). We therefore categorically reject Rutledge's argument that prejudice automatically inheres in a trial when a juror inadvertently sees a defendant in handcuffs. Our position is in accord with other circuits that have addressed this issue. See, e.g., United States v. Ware, 897 F.2d 1538, 1542 (10th Cir.), cert. denied, 496 U.S. 930, 110 S.Ct. 2629, 110 L.Ed.2d 649 (1990); United States v. Garcia-Rosa, 876 F.2d 209, 236 (1st Cir. 1989); United States v. Halliburton, 870 F.2d 557, 561 (9th Cir.), cert. denied, 492 U.S. 910, 109 S.Ct. 3227, 106 L.Ed.2d 575 (1989). In situations such as this one, we hold that the defendant bears the burden of proving that he has suffered actual prejudice. See, e.g., Garcia-Rosa, 876 F.2d at 236. Here, neither Rutledge nor the record



indicate that Rutledge has suffered actual prejudice.

The trial judge, in the best position to evaluate such things, stated on the record that he believed that Rutledge suffered no prejudice. In addition, the trial judge not only offered a curative instruction, but specifically asked Rutledge's counsel what she wanted done. In a decision that was likely well-informed by her trial experience and reached after consultation with her client, Rutledge's counsel decided that dwelling on the incident was unwise. Her failure to request the voir dire at this time supports our belief that Rutledge's encounter with the jurors had no effect on his trial and that this encounter could only have prejudiced him if the jurors had been browbeaten about it.

The task of trying cases is one of dizzying pace and fraught with unexpected twists and turns. All parties to this trial (save Rutledge himself) surely sought to prevent the very incident that happened in this case, but it happened nevertheless. The trial judge acted swiftly and offered Rutledge the remedy of his choice. If Rutledge's counsel had been hell-bent on voir dire 'ing the jurors, she had ample opportunity to request that of the trial judge. Rutledge and his counsel thought it best to put the incident behind them and move on; the trial judge agreed. We believe Rutledge suffered no prejudice, that the trial judge and Rutledge's counsel recognized that there was no prejudice, and that the trial judge handled this incident properly. [FN2]

FN2. Because Rutledge suffered no prejudice from the jurors' inadvertent sighting of him in handcuffs, we refrain from discussing Rutledge's role in creating whatever effect there may have been on his trial. Suffice it to say that defendants are well-advised to act as diligently as the court personnel in avoiding this type of incident.

[4] Rutledge next complains of the admission of certain testimony by Malott linking Rutledge with the Latin Kings. He claims that this testimony was offered to inflame the jury, that its prejudicial effect greatly outweighed its probative value, and that it

should have been excluded, apparently pursuant to Federal Rule of Evidence 403. We disagree.

Malott testified that after Rutledge was arrested in July 1989, he cooperated with agents from the Illinois State Police by giving them a statement concerning Rutledge's drug operation. Later, Malott discovered that Rutledge had obtained a copy of Malott's statement upon his release from prison. Rutledge then contacted Malott by telephone to inform Malott that Rutledge had a bullet with Malott's name on it. The two men met, and Rutledge showed Malott his copy of Malott's statement. Rutledge then waived a handgun at Malott and said:

We're going to have to get this straightened out. You know, I can have the Latin Kings down here in two hours to take care of this. I'm not going to jail for twenty years over your lying, making these kind of statements.

*885 One week after Rutledge threatened Malott, Malott discovered a copy of his statement affixed to the side window of his truck; the letters "LK" were spray-painted in red on the statement. Two days later, three Hispanic men, believed by Malott to be members of the Latin Kings, drove their car into the driveway of Malott's home. Malott scared them off by brandishing a shotgun.

Rutledge's threats were enough to cause Malott to perjure himself before the state grand jury by denying that Rutledge operated a drug ring. At trial, the government offered Malott as one of its principal witnesses against Rutledge and the others. The government offered Malott's testimony describing Rutledge's threats, which necessarily invoked Rutledge's gang affiliation, to meet what it expected to be vigorous attempts to impeach Malott on the basis of his prior inconsistent statements before the state grand jury. Over objections, the trial judge allowed Malott to testify to Rutledge's threats. As expected, counsel for each defendant extensively cross-examined Malott about his previous perjury.

[5] Rule 403 operates to exclude otherwise

relevant evidence only if its probative value is substantially outweighed by its potential to create unfair prejudice to the defendant. In this instance, the trial court determined that Malott's testimony regarding Rutledge's threats should not be excluded. We review the trial court's decision to admit evidence for an abuse of that court's discretion. See, e.g., *United States v. Williams*, 31 F.3d 522, 527 (7th Cir.1994). It is clear to us that the district court did not abuse its discretion in admitting this aspect of Malott's testimony.

Naturally, the vast majority of the government's evidence against a defendant is prejudicial to him. That's the idea. But in order to find that a particular piece of evidence must be excluded pursuant to Rule 403, its probative value must be insignificant compared to its inflammatory nature so that the evidence unfairly prejudices the defendant. That is not the case here. The government had a right to rehabilitate Malott as a witness by explaining his prior perjury; to do so, Malott was required to recount the reasons that he had perjured himself. Rutledge does not deny that Malott's testimony is true, he simply claims that his testimony is too prejudicial.

Rutledge seems to argue that simply connecting a defendant with a gang constitutes unfair prejudice that substantially outweighs any probative value. We have approved, however, the admissibility of evidence of gang affiliation in a number of cases for a number of purposes. See, e.g., *United States v. Rodriguez*, 925 F.2d 1049, 1053 (7th Cir.1991); *United States v. Lewis*, 910 F.2d 1367, 1372 (7th Cir.1990) (collecting cases). More specifically, we have permitted its admissibility to explain a witness's prior inconsistent statement made out of fear of gang retaliation. *United States ex rel. Garcia v. Lane*, 698 F.2d 900, 902 (7th Cir.1983). Malott's testimony regarding Rutledge's threats was highly probative evidence explaining Malott's prior inconsistent statement, and the trial court did not abuse its discretion in admitting it.

[6] Rutledge's third argument is that

because Rick Bolen did not testify at trial or at the sentencing hearing all statements attributed to him in the presentence report should have been omitted. He claims that because he was unable to cross-examine Bolen, Bolen's statements do not have the requisite indicia of reliability. Rutledge misperceives the reliability requirement.

At the sentencing hearing, Rutledge objected to the district court's consideration of Bolen's statements in the presentence report. Bolen's statements told of the incident in which Rutledge showed Bolen the marijuana and cocaine in the trunk of Rutledge's car and of other occasions on which Bolen accompanied Rutledge to Iowa to deliver or obtain cocaine. To establish Bolen's reliability, the government called the case agent, Bruce Harmening. Harmening testified that he had compared the statements in the presentence report given by Bolen with the statements and trial testimony of other witnesses and with the physical evidence and found no significant inconsistencies. He testified that there were some minor inconsistencies, such as a variance of a few days with respect to *886 dates of excursions to obtain drugs and slight differences in estimations as to the amount of cocaine Rutledge sold weekly. The district court found Harmening's testimony sufficient to support the probation officer's position in the presentence report.

The court then informed Rutledge that in order to challenge Bolen's statements, he must present evidence in addition to a simple denial demonstrating that Bolen's statements were not true. Rutledge discussed with his counsel whether to present any such evidence during a brief recess. They then informed the court that they would not present any evidence.

The district court conducted this aspect of Rutledge's sentencing hearing precisely in accordance with the controlling case in this circuit, *United States v. Coonce*, 961 F.2d 1268 (7th Cir.1992). In Coonce, we articulated the proper procedure for contesting facts upon which a district court relies to sentence a defendant. We stated:



First, the defendant must challenge the facts in the presentence report ... as being unreliable or incorrect. Having done so, and assuming the facts as presented bear sufficient indicia of reliability, the defendant must carry the burden of presenting some evidence beyond a mere denial calling the reliability or correctness of the alleged facts into question. If the defendant meets this burden of production, the burden of persuasion then shifts back to the prosecution, who in turn must convince the court that the facts presented by the government are actually true.

Id. at 1280. Rutledge contends that the facts he has called into question, Bolen's statements, do not bear an indicia of reliability sufficient to trigger his burden of production under Coonce. He claims that Bolen's statements are simply naked assertions; as a result, he asserts that Coonce permits a mere denial to render them inapplicable in sentencing.

As an initial matter, Bolen's statements are not simply naked assertions. Plenty of other witnesses intimately involved in Rutledge's operation testified about his drugs and guns; that Bolen's statements are consistent with these other accounts indicates that they are based in fact. See *United States v. Westbrook*, 986 F.2d 180 (7th Cir.1993). In addition, this consistency coupled with Harmening's testimony adequately support the district court's finding that Bolen's statements bear a sufficient indicia of reliability. Rutledge's challenge to these statements, therefore, fails.

[7][8] Rutledge's fourth and final argument is that his Fifth Amendment rights have been violated because he was convicted and sentenced for operating a continuing criminal enterprise and for conspiracy to distribute cocaine. The Double Jeopardy Clause of the Fifth Amendment protects defendants from being tried and punished for the same offense twice. While the conspiracy charge is a lesser included offense of the CCE charge, double jeopardy is not implicated as long as district court does not impose cumulative sentences for the crimes. *United States v. Bond*, 847 F.2d 1233, 1238 (7th Cir.1988); see also

Jeffers v. United States, 432 U.S. 137, 157-58, 97 S.Ct. 2207, 2219-20, 53 L.Ed.2d 168 (1977). This is because:

[O]ne can both conspire (agree to run a drug business) and run a continuing criminal enterprise (strike the agreement and succeed)... The statutes reach the same group of persons. It is not illogical to convict a person of both agreeing to do something (§ 846) and succeeding on a grand scale (§ 848). *Bond*, 847 F.2d at 1238. Concurrent sentences may be imposed for conspiracy and CCE provided the cumulative punishment does not exceed the maximum under the CCE act. *United States v. Bafia*, 949 F.2d 1465, 1473 (7th Cir.1991); *Bond*, 847 F.2d at 1239.

[9] In this case, the district court sentenced Rutledge to life imprisonment on his CCE conviction and life imprisonment on the conspiracy conviction to run concurrently with the CCE sentence. The maximum penalty under the CCE act at the time of Rutledge's sentencing was life imprisonment. Thus, by imposing concurrent sentences, the district court did not impose a cumulative penalty, and Rutledge's sentence is proper.

*887 B. Shelly Henson

[10] Henson's first argument is that the government's evidence against her is insufficient to support her conviction. In her brief, she went so far as to say: "Clearly, there was no specific evidence as to Shelly Henson's role in regard to said conspiracy." We disagree; the government presented evidence that overwhelmingly supports Henson's conviction.

[11] In reviewing Henson's claim, we must review the evidence in a light most favorable to the government, drawing all reasonable inferences. Then, we must ascertain whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

The government's evidence featured testimony from several witnesses intimately involved in Rutledge's drug conspiracy. Kim Mummert testified that Henson obtained

cocaine for Rutledge, sold drugs that she received from Rutledge while living with him in the trailer, and helped pay the bills with money she earned selling Rutledge's drugs. Randy Mustread testified that Henson sold cocaine for Rutledge, delivered cocaine for him, and collected payment. Roger Malott testified that Henson cut cocaine for Rutledge, delivered cocaine for him, and collected payment. Malott also testified that Henson kept Rutledge's accounts regarding drug transactions. Michael Wright testified that Henson arranged cocaine sales for Rutledge and collected payments. The government's evidence easily supports Henson's conviction.

[12] Henson next argues that the district court abused its discretion by admitting evidence of a pistol she had in her possession. Although the district court provided the jury with several instructions regarding the limited purposes for which they could consider this evidence, Henson maintains that the jury was unable to follow these instructions. The district court properly admitted this evidence.

The gun was obtained by authorities from Henson when she and Wright were arrested in early 1989 in possession of one ounce of cocaine. The .25 caliber semi-automatic handgun and ammunition were found in Henson's purse. The police also found in Henson's purse Western Union money transfers which represented payment for drugs that Rutledge purchased from Randy Mustread.

The gun was introduced by Illinois State Police Special Agent Bruce Kettlekamp, who testified that he had discovered the gun in Henson's purse during the course of her arrest. Henson's counsel objected to the gun's relevancy, and district court overruled the objection and admitted the testimony for the limited purposes of showing a connection between Rutledge and Henson and for supporting the weapons charges against Rutledge. An ATF agent then testified as to the chain of custody of the gun, at which time the district court again reminded the jury of the limited purposes of the testimony regarding the gun. In addition, Wright,

Mustread, and Malott all testified that Henson carried the gun, which was given to her by Rutledge ostensibly for her protection. During the testimony of each of these witnesses, the district court again admonished to consider the testimony for Henson's connection to Rutledge and with respect to Rutledge's gun charge.

It is clear that the district court addressed this situation perfectly. The government properly presented this evidence to demonstrate Henson's role in Rutledge's drug enterprise and to connect Rutledge to the gun. Any potential for prejudice to Henson was snuffed out by the district court's repeated warnings to the jury. And, of course, we presume that jurors do what they are told. See, e.g., *United States v. Scott*, 19 F.3d 1238, 1244 (7th Cir.1994) (citations omitted). The district court therefore properly admitted the evidence of the gun.

[13] Henson's next argument centers on a statement made by a prosecutor during closing argument. At that time, one of the prosecutors commented on the credibility of a defense witness. The prosecutor commented that this witness claimed that she saw Roger Malott near her home during the time in which Malott was in custody. The prosecutor then stated that "[t]he defense should have been embarrassed to hear her say that." Henson's counsel immediately objected, *888 and the district court sustained the objection. The prosecutor went on to state that the witness' testimony was a physical impossibility, to which Henson's counsel did not object. Henson argues that the prosecutor's statement was so prejudicial to her that she requires a new trial.

[14] We evaluate the prosecutor's comments to determine whether they were improper. *United States v. Neely*, 980 F.2d 1074, 1084-85 (7th Cir.1992). If so, a new trial is warranted only if "the prosecutor's comments infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986) (citation omitted). The prosecutor's



comments in this case, while improper, do not remotely rise to the level of a due process violation. They were directed at a witness for another defendant and did not bear at all on the evidence presented against Henson. Also, the judge quickly granted Henson's counsel's objection, and Henson's counsel had ample opportunity to counter the prosecutor's comments during the course of her argument. Finally, the evidence was so overwhelmingly against Henson on the conspiracy charge on which she was convicted that this minor transgression did not affect her guilty verdict at all.

[15] Henson's last argument, also advanced by Richard Hagemaster, is that the district court erred in giving the government's multiple conspiracy instruction rather than one she preferred. Henson claimed that she was not involved in Rutledge's cocaine conspiracy, but in different conspiracies for which she was not prosecuted; she preferred a detailed instruction that she believed was necessary to present her defense. Notwithstanding the overwhelming evidence of her participation in Rutledge's cocaine operation, the district court, who admitted doubt of its necessity, gave the government's multiple conspiracy instruction. Again, the district court made the proper decision.

[16][17][18] In reviewing the fitness of jury instructions to which objections were properly raised in the proceedings below, "we must determine from looking at the charge as a whole, 'whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues.' " *United States v. Boykins*, 9 F.3d 1278, 1285 (7th Cir.1993) (quoting *Trustees of Indiana Univ. v. Aetna Casualty and Sur. Co.*, 920 F.2d 429, 437 (7th Cir.1990)). A defendant is not entitled to have a particular instruction presented to the jury, but only to have her theory of the defense presented. *United States v. Boucher*, 796 F.2d 972, 976 (7th Cir.1986). In these matters, the district court is given substantial discretion with respect to the specific wording of the instruction. *United States v. Penson*, 896 F.2d 1087, 1090 (7th Cir.1990).

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The instruction tendered by the government and given by the district court informed the jury that if it should find that a particular defendant did not join the conspiracy that was charged in the indictment, it must find the defendant not guilty of conspiracy. This is the very instruction of which we approved in similar circumstances in *Penson*, 896 F.2d at 1091. Since we are not sure that a multiple conspiracy instruction is even warranted in this case, we agree with the district court that government's tendered instruction "is all any defendant could legitimately ask for in relation to this type of instruction." Henson and Hagemaster were not prejudiced by the district court's failure to give their preferred multiple conspiracy instruction.

C. Richard Hagemaster

[19] Hagemaster's principal argument is that the district court erred in admitting Michael Wright's in-court identification of Hagemaster. He claims that Wright's identification is unreliable and therefore constitutes a denial of his Fifth Amendment Due Process rights. This argument is without merit.

During the course of the trial, Wright described a particular drug transaction that transpired in 1988 in which he gave money to Henson to deliver to Rutledge in exchange for an ounce of cocaine. Wright testified that he had waited several hours and after calling Rutledge twice to remind him of his order, Rutledge assured Wright that the courier was on his way. Wright continued:

*889 Forty-five minutes to an hour later, a car pulled up in the driveway, an old VW bug with no fenders on the rear end, and a tall, skinny guy got out wearing a fatigue jacket, pearl earring in his ear. Like I say, a very slender person. Crowe let him in. He introduced me to—I believe his name was—his name was Rick at the time. And we sat there and talked and, anyway, this guy, this Rick or the guy that had brought the dope, he threw it out on the coffee table and he said, "This is what it is."

Wright testified that he was displeased with the quality of the cocaine and that



Hagemaster must have realized Wright's displeasure by the expression on his face because Hagemaster informed Wright that if the cocaine was unacceptable, Rutledge would return Wright's money. Wright then identified Hagemaster, in court and seated at the defense table, as the cocaine courier.

On cross-examination, Hagemaster's counsel pressed Wright for more details of the transaction. Wright happily obliged. Wright described Hagemaster's clothing again and testified that Hagemaster sat for thirty minutes in his living room where there were three or four lamps providing light. Wright also testified that he had seen Hagemaster on another occasion at Rutledge's trailer when Wright was there to obtain cocaine.

Wright also testified that he had originally described Hagemaster to investigating agents in 1990. Also, in a subsequent meeting with them, the agents showed Wright a single photograph and asked him whether he recognized the person in the photograph. The person in the photograph was Richard Hagemaster, although the agents did not so identify him to Wright. It is the presentation of the single photograph of Hagemaster to Wright that Hagemaster claims was so suggestive as to render Wright's in-court identification of Hagemaster unreliable.

[20] The admissibility of a challenged in-court identification is governed by a two-part test. First, we must determine whether the initial out-of-court identification was unduly suggestive; here, the presentation of the single photograph of Hagemaster. If so, the in-court identification is inadmissible unless it is so reliable, in view of the totality of the circumstances, as to prevent a substantial likelihood of misidentification. *Manson v. Brathwaite*, 432 U.S. 98, 107-14, 97 S.Ct. 2243, 2249-53, 53 L.Ed.2d 140 (1977). The district court determined that the presentation of the single photograph of Hagemaster to Wright was unduly suggestive, and we do not disagree. But we also agree with the district court that Wright's in-court identification of Hagemaster was sufficiently reliable that it withstands Hagemaster's due process

challenge.

[21] Our inquiry into the reliability of Wright's in-court identification of Hagemaster is guided by several factors: the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time of the crime and the confrontation. *United States v. Larkin*, 978 F.2d 964, 970 (7th Cir.1992) (citing *Manson*, 432 U.S. at 114, 97 S.Ct. at 2253). In this case, the totality of the circumstances, within the framework of these factors, demonstrates that Wright's in-court identification was indeed reliable.

Wright testified that he spent thirty minutes with Hagemaster in his well-lighted living room at the time of the crime. This provided Wright with ample opportunity to view Hagemaster. Wright's testimony indicates that he was quite attentive during the commission of the crime. He described Hagemaster's VW bus and his appearance in significant detail. In addition, Wright's belief that Hagemaster could see the displeasure register on Wright's face indicates that the two men were in reasonably close proximity with one another, each capable of noticing the other's features and expressions. And while the lapse of time between the time of the commission of the crime and the trial is not insignificant, Wright's detailed description of Hagemaster and his conviction that the man at the defense table was Hagemaster demonstrate that the identification was reliable. The district court properly admitted Wright's in-court identification of Hagemaster. *890 Hagemaster's other claims are without merit and do not require discussion.

III. Conclusion

For the foregoing reasons, the convictions of Tommy Lee Rutledge, Shelly Henson, and Richard Hagemaster are

AFFIRMED.



FILED**United States District Court** DEC 29 1992

CENTRAL

District of ILLINOIS

JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA

V.

TOMMY L. RUTLEDGE

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 91-40009-01

Howard Vincent Thomas
Defendant's Attorney

THE DEFENDANT: Tommy L. Rutledge

pleaded guilty to count(s) _____
 was found guilty on count(s) 1-6 of the second superseding indictment after a
 plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|------------------------|---|------------------------|-----------------|
| 21:848 | Continuing Criminal Enterprise | 12/1/90 | 1 |
| 21:846 | Conspiracy to possess with intent to distribute & to distribute cocaine, a schedule II controlled substance | 12/1/90 | 2 |
| 21:841(a)(1) & 18:2 | Distribution of cocaine, a schedule II controlled substance | 12/1/90 | 3 |
| 18:922(g) | Felon in possession of a firearm | 12/1/90 | 4 |
| 18:924(c) | Armed drug trafficker | 12/1/90 | 5 & 6 |

The defendant is sentenced as provided in pages 2 through 12 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984..

The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s). counts 1-3
 Count(s) original crts. 1-3 & 1st superseding (are) dismissed on the motion of the United States.
 It is ordered that the defendant shall pay a special assessment of \$ 300.00 for count(s) 1-6 of second superseding indictment which shall be due immediately as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 361-38-1590

Defendant's Date of Birth: 06-11-47

Defendant's Mailing Address:

in custody

Defendant's Residence Address:

in custody

December 23, 1992

Date of Imposition of Sentence;

Michael M. Mihm

Signature of Judicial Officer

MICHAEL M. MIHM-CHIEF, U.S. DISTRICT JUDGE

Name & Title of Judicial Officer

December 29, 1992

Date

Defendant: Tommy L. Rutledge
Case Number: 91-40009-01

Judgment - Page 2 of 12

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of life on Count 1 of 2nd Superseding Indictment; life without possible release to run concurrent to Count 1 on Count 2 of the 2nd superseding indictment; life without possible release to run concurrent to Counts 1 & 2 on Count 3 of the 2nd superseding indictment; ten (10) years on Count 4 of the 2nd superseding indictment to run concurrent with counts 1, 2 & 3; sixty (60) months on Count 5 of the 2nd superseding indictment to run consecutive to counts 1, 2, 3, 4 & 6; one hundred twenty (120) months on Count 6 of the 2nd superseding indictment to run consecutive to Counts 1, 2, 3, 4 & 5.

The court makes the following recommendations to the Bureau of Prisons:

The defendant is remanded to the custody of the United States marshal.
 The defendant shall surrender to the United States marshal for this district.

— at _____ p.m. on _____
 — as notified by the United States marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
 — before 2 p.m. on _____
 — as notified by the United States marshal.
 — as notified by the probation office.

RETURN

I have executed this judgment as follows:

 Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

United States Marshal

By _____
 Deputy Marshal

Defendant: Tommy L. Rutledge
Case Number: 91-40009-01

Judgment - Page 3 of 12

FINE

The defendant shall pay a fine of \$ _____. The fine includes any costs of incarceration and/or supervision.

This amount is the total of the fines imposed on individual counts, as follows:

NO FINE, COSTS OF INCARCERATION OR RESTITUTION ARE APPROPRIATE.

The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

- The interest requirement is waived.
- The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

- in full immediately.
- in full not later than _____
- in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
- in installments according to the following schedule of payments:

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Defendant: Tommy L. Rutledge
Case Number: 91-40009-01

Judgment - Page 4 of 12

STATEMENT OF REASONS

() The Court adopts the factual findings and guideline application in the Presentence Report.

OR

(X) The Court adopts the factual findings and guideline application in the Presentence Report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 40

Count 1: 20 years

Counts 2 & 3: life

Count 5: 5 years

Count 6: 10 years

Imprisonment Range: Counts 1-4: 5 to life months Mandatory Min: Count 6: 10 years

Count 5: 5 years & Count 6: 10 years

Supervised Release Range: 3 to 5 years

Count 1: 3-5 years; Counts 2 & 3: N/A; Counts 4, 5 & 6: 1-3 years

Fine: \$25,000 to \$8,000,000.00

(X) Fine is waived or is below the guideline range because of the defendant's inability to pay.

Restitution: \$ N/A

() Full restitution is not ordered for the following reason(s):

() The sentence is within the guideline range, that range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by application of the guidelines.

OR

(X) The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): pursuant to statutory enhancements of life imprisonment

OR

The sentence departs from the guideline range

() upon motion of the Government, as a result of defendant's substantial assistance.

() for the following reasons:

RE: RUTLEDGE, Tommy Lee

RE: RUTLEDGE, Tommy Lee

Case No. 91-40009-01

**ADDENDUM II TO THE PRESENTENCE REPORT
DATED 09/23/92 AND REVISED 10/29/92**

NAME: RUTLEDGE, Tommy Lee

DOCKET NO. 91-40009-01

The following objections were raised by the Government and defendant and ruled on by the Court at the December 23, 1992, Sentencing Hearing.

OBJECTIONS**By the Government****I. Reference page 26, paragraph 146**

- A. The Government objects to paragraph 146 as a consecutive term of imprisonment of 60 months must be imposed on Count 5, and a consecutive term of imprisonment of 120 months must be imposed on Count 6.
- B. The defendant neither objects nor concurs with the Government.

Court's Findings

1. Court adopts probation officer's position.
2. Court adopts Government's position.
3. Court adopts defendant's position.
4. Other: _____

By the Defendant**I. Reference page 19, paragraph 105**

- A. The defendant objects to paragraph 105 as the conviction in this paragraph was reversed and overturned by the State of Illinois Appellate Court. Therefore, the three criminal history points documented in this paragraph should be deleted.
- B. The position of the Government and probation office concurs with that of the defendant.

Court's Findings

1. Court adopts probation officer's position.

31(a)

2. Court adopts Government's position.
3. Court adopts defendant's position.
4. Other: _____

II. Reference page 19, paragraph 109

- A. The defendant objects to paragraph 109 as the conviction contained in this paragraph was reversed and overturned by the State of Illinois Appellate Court. Therefore, the two criminal history points contained in this paragraph should be deleted.
- B. The position of the Government and probation office concurs with that of the defendant.

Court's Findings

1. Court adopts probation officer's position.
2. Court adopts Government's position.
3. Court adopts defendant's position.
4. Other: _____

III. Reference page 21, paragraph 113

- A. The defendant objects to paragraph 113 as the conviction contained in this paragraph was in regards to his son, Thomas L. Rutledge Jr., and not the defendant. Therefore, the one criminal history point contained in this paragraph should be deleted.
- B. The position of the Government and the probation office concurs with that of the defendant.

Court's Findings

1. Court adopts probation officer's position.
2. Court adopts Government's position.
3. Court adopts defendant's position.

31(b)

RE: RUTLEDGE, Tommy Lee

Case No. 91-40009-01

4. Other: _____
-

IV. Reference page 21, paragraphs 114 and 115

- A. The defendant objects to the additional criminal history points contained in these paragraphs.
- B. The position of the Government and probation office remains as stated in paragraphs 114 and 115.

Court's Findings

1. Court adopts probation officer's position.
 2. Court adopts Government's position.
 3. Court adopts defendant's position.
 4. Other: _____
-

V. Reference page 23, paragraph 131

- A. The defendant objects to paragraph 131 as the arrest contained in this paragraph involved the defendant's son, Thomas L. Rutledge Jr., and not the defendant.
- B. The position of the Government and probation office concurs with that of the defendant.

Court's Findings

1. Court adopts probation officer's position.
 2. Court adopts Government's position.
 3. Court adopts defendant's position.
 4. Other: _____
-

31(c)

RE: RUTLEDGE, Tommy Lee

Case No. 91-40009-01

VI. Reference pages 13, 14, and 17, paragraphs 85, 86, 87, and 98

- A. The defendant objects to these paragraphs as he never made death threats against any witnesses, codefendants, or U.S. Attorneys.
- B. The position of the Government and probation office remains as stated in paragraphs 85, 86, 87, and 98.

Court's Findings

1. Court adopts probation officer's position.
2. Court adopts Government's position.
3. Court adopts defendant's position.
4. Other: The Court found the defendant did threaten witnesses and codefendants. However, the Court was unable to determine if the letter (poem entitled "Satan Letter") prepared by the defendant was intended to be threatening.

VII. Reference Offense Conduct

- A. The defendant objects to all statements by all the codefendants concerning the quantities of cocaine, arson, and trade of weapons as all of these statements are untrue and based upon mere hearsay.
- B. The position of the Government and probation office remains as stated in the Offense Conduct section of the Presentence Report.

Court's Findings

1. Court adopts probation officer's position.
 2. Court adopts Government's position.
 3. Court adopts defendant's position.
 4. Other: _____
-

VIII. Reference page 3, paragraph 14

- A. The defendant objects to paragraph 14 as Richard Hagemaster never delivered cocaine for the defendant, Tom Rutledge and Don Taylor never

31(d)

RE: RUTLEDGE, Tommy Lee
Case No. 91-40009-01

RE: RUTLEDGE, Tommy Lee
Case No. 91-40009-01

traveled to Iowa to purchase cocaine, Tom Rutledge and Shelly Henson never distributed cocaine, and Stan Winters never delivered cocaine for Tom Rutledge.

- B. The position of the Government and probation office remains as stated in paragraph 14.

Court's Findings

1. Court adopts probation officer's position.
2. Court adopts Government's position.
3. Court adopts defendant's position.
4. Other: _____

IX. Reference page 3, paragraph 16

- A. The defendant objects to paragraph 16 as he did not possess numerous firearms at any time.
B. The position of the Government and probation office remains as stated in paragraph 16.

Court's Findings

1. Court adopts probation officer's position.
2. Court adopts Government's position.
3. Court adopts defendant's position.
4. Other: _____

X. Reference page 3, paragraph 17

- A. The defendant did not carry a firearm or carry a firearm during and in relation to any drug trafficking crime. Further, the U.S. Government dismissed the charges against Tom Rutledge for possessing firearms on or about July 14, 1989.
B. The position of the Government and probation office remains as stated in paragraph 17.

Court's Findings

1. Court adopts probation officer's position.
2. Court adopts Government's position.
3. Court adopts defendant's position.
4. Other: _____

XI. Reference page 5, paragraphs 29, 30, and 31

- A. The defendant objects to these paragraphs as Rick Bolen did not testify during the trial and cannot be considered a credible witness.
B. The position of the Government and probation office remains as stated in paragraphs 29, 30, and 31.

Court's Findings

1. Court adopts probation officer's position.
2. Court adopts Government's position.
3. Court adopts defendant's position.
4. Other: _____

XII. Reference Offense Conduct

- A. The defendant objects to the offense conduct as he did not possess, sell, or distribute or conspire to do any drug transactions.
B. The position of the Government and probation office remains as stated in the Offense Conduct section of the Presentence Report.

Court's Findings

1. Court adopts probation officer's position.
2. Court adopts Government's position.
3. Court adopts defendant's position.

RE: RUTLEDGE, Tommy Lee
Case No. 91-40009-01

RE: RUTLEDGE, Tommy Lee
Case No. 91-40009-01

4. Other: _____

XIII. Reference page 5, paragraph 33

- A. The defendant objects to paragraph 33 as he did not visit Mustread in Galesburg, Illinois, and he did not purchase 4 ounces of cocaine.
- B. The position of the Government and probation office remains as stated in paragraph 33.

Court's Findings

1. Court adopts probation officer's position.
2. Court adopts Government's position.
3. Court adopts defendant's position.
4. Other: The Court found that defendant Rutledge did not visit Mustread in Galesburg, Illinois. However, the Court did find that the defendant purchased 4 ounces of cocaine while with Mustread.

XIV. Reference page 6, paragraph 35

- A. The defendant objects to paragraph 35 as John Wilson was called as a defense witness at trial and testified that he did not trade defendant Rutledge a Ruger rifle for cocaine.
- B. The position of the Government and probation office remains as stated in paragraph 35.

Court's Findings

1. Court adopts probation officer's position.
2. Court adopts Government's position.

3. Court adopts defendant's position.
4. Other: _____

CERTIFIED BY

WADE B. MADDOX
WADE B. MADDOX
U.S. Probation Officer

Reviewed and Approved:

Roger C. Abrens
ROGER C. ABRENS
Deputy Chief U.S. Probation Officer

Dated 12/23/92

The Court adopts the above-listed findings on December 3, 1992

Michael M. Mihm
HONORABLE MICHAEL M. MIHM
Chief U.S. District Judge

31(g)

31(h)

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 3, 1995.

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. JAMES L. FOREMAN, District Judge*

UNITED STATES OF AMERICA,) Appeal from the United
Plaintiff-Appellee,) States District Court
) for the Central
) District of Illinois,
No. 93-1122 v.)
) 91 CR 40009
TOMMY L. RUTLEDGE)
) Michael M. Mihm,
Defendant-Appellant.) Chief Judge.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-captioned case by defendant-appellant, a majority of the judges on the original panel have voted to deny and none of the judges in active service has requested a vote thereon.

Therefore, the petition for rehearing with suggestion for rehearing en banc is DENIED.

* The Honorable James L. Foreman, United States District Judge for the Southern District of Illinois, is sitting by designation.

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
AT ROCK ISLAND

FILED

1991

WINTERS, Clerk
COURT OF APPEALS
OF ILLINOIS

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

TOMMY LEE RUTLEDGE,)
SHELLY HENSON,)
RICHARD HAGEMASTER,)
STAN WINTERS, and)
DONALD TAYLOR,)

Defendants.)

Criminal No. 91-40009

VIO: Title 18, United States Code, Sections 2, 922(g) and 924(c); Title 21, United States Code, Sections 841(a)(1), 846 and 848

SECOND SUPERSEDING INDICTMENT

The Grand Jury charges:

COUNT 1

Beginning in or about early 1988 and continuing at least until in or about late 1990, in Warren County, Illinois, within the Central District of Illinois, and elsewhere,

TOMMY LEE RUTLEDGE,

the defendant herein, knowingly and intentionally did engage in a continuing criminal enterprise, namely a series of violations of Title 21, United States Code, Sections 841(a)(1) and 846 by repeatedly distributing and possessing with intent to distribute quantities of cocaine, which continuing series of violations were undertaken by

TOMMY LEE RUTLEDGE

in concert with at least five (5) other persons with respect to whom

TOMMY LEE RUTLEDGE

occupied positions of organizer, supervisor, and other positions of management, and from which continuing series of violations

TOMMY LEE RUTLEDGE

obtained substantial income and resources.

2. As part of this continuing criminal enterprise, the defendant,

TOMMY LEE RUTLEDGE,

committed and caused to be committed numerous acts, including but not limited to the acts set forth hereinafter in Counts 3, 4 and 5, which counts are incorporated by reference as if fully set forth here.

In violation of Title 21, United States Code, Section 848.

COUNT 2

1. Beginning in or about early 1988, and continuing until in or about late 1990, in Warren County, within the Central District of Illinois and elsewhere,

**TOMMY LEE RUTLEDGE,
SHELLY HENSON,
RICHARD HAGEMASTER,
STAN WINTERS, and
DONALD TAYLOR,**

the defendants herein, did knowingly combine, conspire and agree with each other and both with persons known and with persons unknown to the grand jury to commit certain acts in violation of the laws of the United States, to-wit: (a) to knowingly possess with intent to distribute cocaine, a Schedule II controlled substance; and (b) to knowingly distribute cocaine, a Schedule II controlled substance, both in violation of Title 21, United States Code, Section 841(a)(1).

2. Over the course of the conspiracy that the defendants distributed and caused to be distributed in excess of 5 kilograms of cocaine.

OVERT ACTS

3. In furtherance of the conspiracy and to accomplish its objects of possessing with intent to distribute and distributing cocaine, the defendants and other persons both known and unknown to the grand jury did commit overt acts, including but not limited to the following:

1. In late 1988, Richard Hagemaster delivered cocaine to an individual for Tommy Lee Rutledge;
2. In early 1989, Tommy Lee Rutledge and Donald Taylor travelled to Iowa to purchase cocaine;
3. In January, 1989, Tommy Lee Rutledge and Shelly Henson distributed cocaine to an individual;
4. In mid-1990, Stan Winters delivered cocaine to an individual for Tommy Lee Rutledge.

All in violation of Title 21, United States Code, Section 846.

COUNT 3

In or about January, 1989, in Warren County, within the Central District of Illinois,

**TOMMY L. RUTLEDGE, and
SHELLY HENSON,**

the defendants herein, did knowingly distribute cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18,

United States Code, Section 2.

COUNT 4

On or about July 14, 1989, in Warren County, within the Central District of Illinois,

TOMMY L. RUTLEDGE,

the defendant herein, did knowingly possess a firearm which had previously travelled in interstate or foreign commerce, to-wit: numerous shotguns, rifles and pistols, the defendant having been previously convicted under the laws of the State of Illinois of a crime punishable by imprisonment for a term exceeding one year.

In violation of Title 18, United States Code, Section 922(g).

COUNT 5

In or about July, 1989, in Warren County, within the Central District of Illinois,

TOMMY LEE RUTLEDGE,

the defendant herein, did knowingly use and carry a firearm during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States, that is the distribution of cocaine, in violation of Title 21, United States Code, Section 841.

In violation of Title 18, United States Code, Section 924(c).

COUNT 6

On or about July 14, 1989, in Warren County, within the Central District of Illinois,

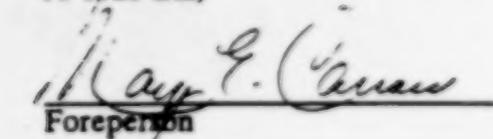
TOMMY LEE RUTLEDGE,

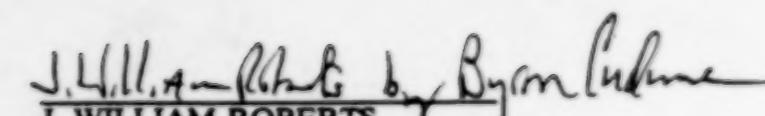
the defendant herein, did knowingly use and carry a firearm during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States,

that is, the distribution of controlled substances and the possession of controlled substances with intent to distribute, in violation of Title 21, United States Code, Section 841.

In violation of Title 18, United States Code, Section 924(c).

A True Bill,


Foreperson


J. WILLIAM ROBERTS
UNITED STATES ATTORNEY

Tommy L. Rutledge
Reg. No. 08829-026
Post Office Box 1000
Leavenworth, KS 66048-7000

October 6, 1994

Thomas F. Strubble, Clerk
United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Re: United States v. Tommy L. Rutledge
Case No. 91-CR-40009, Appeal No. 931122

Dear Mr. Strubble:

Pursuant to Federal Rule of Appellate Procedure 28(j), I would like to bring the Court's attention to the recent decision United States v. Cappas, 29 F.3d 1187 (7th Cir. 1994). In Cappas this Court held a defendant cannot be punished separately for both CCE and conspiracy quoting United States v. Bafia, 949 F.2d 1465, 1472-75 (7th Cir. 1991), cert. denied, 112 S.Ct. 1989 (1992).

I would like to point out one important fact concerning the Bafia case. The Court in Bafia stated:

" . . . to understand the rather confusing progression of Jefferson (hereinafter 'Jefferson I') and its subsequent history-and, we hope, to resolve once and for all (or at least until the Supreme Court directs otherwise) any confusion regarding multiple sentences under §§ 846 and 848--we shall trace the development of the law of conspiracy and CCE conviction."

949 F.2d at 1472.

This Court stated: "until the Supreme Court directs otherwise" and the Supreme Court has directed otherwise." See Mohwish v. United States, rev'd and remanded for further consideration of position presently asserted by the Acting Solicitor General, 113 S.Ct. 1378 (1993) (No. 92-982). In Mohwish the Solicitor General stated:

"On appeal, petitioner argued that, under Jeffers v. United States, 432 U.S. 137, 154-58 (1977), his conviction for drug

Thomas F. Strubble
October 6, 1994
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conspiracy in violation of 21 U.S.C. § 846, on which he had received a sentence concurrent with his sentence for the CCE violation, must be vacated in light of his CCE conviction. The government agreed that upon petitioner's valid CCE conviction, the drug conspiracy conviction should be vacated. Gov't C.A. Br. 46-47. The court of appeals, however, did not address that issue and instead affirmed petitioner's drug conspiracy conviction.

As we explained in our brief in opposition to the petition for certiorari in Fernandez v. United States, cert. denied, 111 S.Ct. 2249 (1991) (No. 90-7210), Congress did not intend to permit cumulative punishment for participating in a drug conspiracy and engaging in a continuing criminal enterprise, at least where the evidence supporting the "in concert" element of the CCE offense is essentially indistinguishable from the evidence supporting the drug conspiracy charge. See Garrett v. United States, 471 U.S. 773, 794 (1985); Jeffers v. United States, 432 U.S. 137, 155 (1977) (plurality opinion).

Respondent's Brief at 13-14.

In the case at bar, the conspiracy was charged as a predicate in the CCE charge in Count One of the indictment.

Respectfully submitted,


Tommy Rutledge
Defendant-Appellant Pro Se

Thomas F. Strubble
October 6, 1994
Page 3

TOMMY L. RUTLEDGE
Register Number 08829-026
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DEFENDANT-APPELLANT PRO SE

I hereby certify that I placed a true and correct copy of the forgoing in the Prisoner's Mail Box located at the United States Penitentiary in Leavenworth, Kansas, this 5th day of October, 1994, first class postage affixed to:

K. Tate Chamber, AUSA
100 N.E. Monroe
Peoria, IL 61602
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Julia Gentile, Esq.
RR 2
Petersburg, IL 62675

for the purpose of service.

Tommy L. Rutledge

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff,)
v.)
TOMMY L. RUTLEDGE,)
Defendant.)

Case No. 93-1122

**PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC**

I. THE COURT OVERLOOKED THE SUPREME COURT'S RECENT DECISION IN MOHAWK WHICH MANDATES THE LESSER INCLUDED OFFENSE OF CONSPIRACY BE VACATED IN THIS CASE.

On page 11 of its opinion, the Court overlooked or misconstrued a recent ruling concerning an issue raised by Rutledge. In addressing Rutledge's argument concerning his Fifth Amendment right to be free of double jeopardy, the Court held:

"The Double Jeopardy Clause of the Fifth Amendment protects defendants from being tried and punished for the same offense twice. While conspiracy is a lesser included offense of the CCE charge, double jeopardy is not implicated as long as district court does not impose cumulative sentences for the crimes."

* * * * *

"Concurrent sentences may be imposed for conspiracy and CCE provided the cumulative punishment does not exceed the maximum under the CCE act."

Opinion at 11.

In United States v. Bafia, 949 F.2d 1465, 1472 (7th Cir. 1991), cert. denied, 112 S.Ct. 1989 (1992), this court held: "until the Supreme Court directs otherwise" convictions under conspiracy and CCE do not violate the double jeopardy clause.

The Court is overlooking the fact that the Supreme Court has directed otherwise. On March 1, 1993, the Supreme Court in Mohwisch v. United States, ___ U.S. ___, 113 S.Ct. 1378, 122 L.Ed.2d 754 (1993), Case No. 92-982, reversed and remanded for reconsideration of the position presently asserted by the Acting Solicitor General in his brief for the United States filed February 5, 1993. In Mohwisch, the Solicitor General stated:

"As we stated in our brief in opposition to the petition for certiorari in Pernadez v. United States, cert. denied, 111 S.Ct. 2249 (1991) (No. 90-7210), Congress did not intend to permit cumulative punishment for participating in a drug conspiracy and engaging in continuing criminal enterprise, at least where the evidence supporting the 'in concert' element of the CCE offense is essentially indistinguishable from the evidence supporting the drug conspiracy charge. See Garrett v. United States, 471 U.S. 773, 794 (1985); Jeffers v. United States, 432 U.S. 137, 155 (1977) (plurality opinion)."

See Attachment 1, Solicitor General's Brief at 13-14.

Mohwisch's claim was identical to the argument put forward by Rutledge, and the Supreme Court reversed and remanded to the district court with instructions to vacate Mohwisch's conviction for the conspiracy. Moreover, Rutledge's claim has gone unopposed by the government in this case. This Court should follow the Supreme Court's directive and remand to the district

court with instructions to vacate Rutledge's conspiracy conviction.

The Court should grant rehearing en banc in this case to bring this circuit in line with Supreme Court precedent and to bring this circuit in line with the other circuits now holding that when a defendant is convicted of conspiracy and CCE, the conspiracy conviction must be vacated.

Respectfully submitted,

Tom L. Rutledge
Tommy L. Rutledge

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing was mailed, postage prepaid, this 6 day of December, 1994, to:

K. Tate Chamber, AUSA
100 N.E. Monroe
Peoria, IL 61602

Julia Gentile
Post Office Box 952
Springfield, IL 62705

for the purpose of service herein.

Tom L. Rutledge
Tommy L. Rutledge

Citation
21 USCA § 848
21 U.S.C.A. § 848

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UNITED STATES CODE ANNOTATED
TITLE 21. FOOD AND DRUGS
CHAPTER 13--DRUG ABUSE PREVENTION AND CONTROL
SUBCHAPTER I--CONTROL AND ENFORCEMENT
PART D--OFFENSES AND PENALTIES
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s 848. Continuing criminal enterprise

(a) Penalties; forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this chapter; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18, or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this chapter.

(b) Life imprisonment for engaging in continuing criminal enterprise

Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a) of this section if--

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2) (A) the violation referred to in subsection (c)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received \$10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

(c) "Continuing criminal enterprise" defined

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if--

(1) he violates any provision of this subchapter or subchapter II of this
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21 USCA § 848
TEXT (b) (2) (B)

chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter--

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
(B) from which such person obtains substantial income or resources.

(d) Suspension of sentence and probation prohibited

In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C.Code, secs. 24-203 to 24-207), shall not apply.

(e) Death penalty

(1) In addition to the other penalties set forth in this section--

(A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) or section 960(b)(1) who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death; and

(B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter II of this chapter who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer's official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

(2) As used in paragraph (1)(b), the term "law enforcement officer" means a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense, and includes those engaged in corrections, probation, or parole functions.

(g) [FN1] Hearing required with respect to the death penalty

A person shall be subjected to the penalty of death for any offense under this section only if a hearing is held in accordance with this section.

(h) Notice by the Government in death penalty cases

(1) Whenever the Government intends to seek the death penalty for an offense under this section for which one of the sentences provided is death, the

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attorney for the Government, a reasonable time before trial or acceptance by the court of a plea of guilty, shall sign and file with the court, and serve upon the defendant, a notice--

(A) that the Government in the event of conviction will seek the sentence of death; and

(B) setting forth the aggravating factors enumerated in subsection (n) of this section and any other aggravating factors which the Government will seek to prove as the basis for the death penalty.

(2) The court may permit the attorney for the Government to amend this notice for good cause shown.

(i) Hearing before court or jury

(1) When the attorney for the Government has filed a notice as required under subsection (h) of this section and the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge if the judge who presided at the trial or before whom the guilty plea was entered is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted--

(A) before the jury which determined the defendant's guilt;

(B) before a jury impaneled for the purpose of the hearing if--

(i) the defendant was convicted upon a plea of guilty;

(ii) the defendant was convicted after a trial before the court sitting without a jury;

(iii) the jury which determined the defendant's guilt has been discharged for good cause; or

(iv) after initial imposition of a sentence under this section, redetermination of the sentence under this section is necessary; or

(C) before the court alone, upon the motion of the defendant and with the approval of the Government.

(2) A jury impaneled under paragraph (1)(B) shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate with the approval of the court that it shall consist of any number less than 12.

(j) Proof of aggravating and mitigating factors

Notwithstanding rule 32(c) of the Federal Rules of Criminal Procedure, when a defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, no presentence report shall be prepared. In the sentencing hearing, information may be presented as to matters relating to any of the aggravating or mitigating factors set forth in subsections (m) and (n) of this section, or any other mitigating factor or any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Where information is presented relating to any of the aggravating factors set forth in subsection (n) of this section, information may be presented relating to any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Information presented may include the

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trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion. Any other information relevant to such mitigating or aggravating factors may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The Government and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the aggravating or mitigating factors and as to appropriateness in that case of imposing a sentence of death. The Government shall open the argument. The defendant shall be permitted to reply. The Government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the Government, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless established by a preponderance of the evidence.

(k) Return of findings

The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factors set forth in subsection (n) of this section, found to exist. If one of the aggravating factors set forth in subsection (n)(1) of this section and another of the aggravating factors set forth in paragraphs (2) through (12) of subsection (n) of this section is found to exist, a special finding identifying any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section, may be returned. A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of this subsection, regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If an aggravating factor set forth in subsection (n)(1) of this section is not found to exist or an aggravating factor set forth in subsection (n)(1) of this section is found to exist but no other aggravating factor set forth in subsection (n) of this section is found to exist, the court shall impose a sentence, other than death, authorized by law. If an aggravating factor set forth in subsection (n)(1) of this section and one or more of the other aggravating factors set forth in subsection (n) of this section are found to exist, the jury, or if there is no jury, the court, shall then consider whether the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without possibility of release or some other lesser sentence. The jury or the

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court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed.

(l) Imposition of sentence

Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence, other than death, authorized by law. A sentence of death shall not be carried out upon a person who is under 18 years of age at the time the crime was committed. A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability--

(1) cannot understand the nature of the pending proceedings, what such person was tried for, the reason for the punishment, or the nature of the punishment; or

(2) lacks the capacity to recognize or understand facts which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

(m) Mitigating factors

In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider mitigating factors, including the following:

(1) The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

(2) The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

(3) The defendant is punishable as a principal (as defined in section 2 of Title 18) in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

(4) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of murder, or other offense resulting in death for which the defendant was convicted, would cause, or would create a grave risk of causing, death to any person.

(5) The defendant was youthful, although not under the age of 18.

(6) The defendant did not have a significant prior criminal record.

(7) The defendant committed the offense under severe mental or emotional disturbance.

(8) Another defendant or defendants, equally culpable in the crime, will not be punished by death.

(9) The victim consented to the criminal conduct that resulted in the victim's death.

(10) That other factors in the defendant's background or character mitigate against imposition of the death sentence.

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(n) Aggravating factors for homicide

If the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the following aggravating factors are the only aggravating factors that shall be considered, unless notice of additional aggravating factors is provided under subsection (h)(1)(B) of this section:

(1) The defendant--

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury which resulted in the death of the victim;

(C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim;

(D) intentionally engaged in conduct which--

(i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and

(ii) resulted in the death of the victim.

(2) The defendant has been convicted of another Federal offense, or a State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute.

(3) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury upon another person.

(4) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.

(5) In the commission of the offense or in escaping apprehension for a violation of subsection (e) of this section, the defendant knowingly created a grave risk of death to one or more persons in addition to the victims of the offense.

(6) The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

(7) The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

(8) The defendant committed the offense after substantial planning and premeditation.

(9) The victim was particularly vulnerable due to old age, youth, or infirmity.

(10) The defendant had previously been convicted of violating this subchapter or subchapter II of this chapter for which a sentence of five or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.

(11) The violation of this title in relation to which the conduct described in subsection (e) of this section occurred was a violation of section 859 of

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this title.

(12) The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

(o) Right of the defendant to justice without discrimination

(1) In any hearing held before a jury under this section, the court shall instruct the jury that in its consideration of whether the sentence of death is justified it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or the victim, and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be. The jury shall return to the court a certificate signed by each juror that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or the victim was not involved in reaching his or her individual decision, and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be.

(2) Not later than one year from November 18, 1988, the Comptroller General shall conduct a study of the various procedures used by the several States for determining whether or not to impose the death penalty in particular cases, and shall report to the Congress on whether or not any or all of the various procedures create a significant risk that the race of a defendant, or the race of a victim against whom a crime was committed, influence the likelihood that defendants in those States will be sentenced to death. In conducting the study required by this paragraph, the General Accounting Office shall--

(A) use ordinary methods of statistical analysis, including methods comparable to those ruled admissible by the courts in race discrimination cases under title VII of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e et seq.];

(B) study only crimes occurring after January 1, 1976; and

(C) determine what, if any, other factors, including any relation between any aggravating or mitigating factors and the race of the victim or the defendant, may account for any evidence that the race of the defendant, or the race of the victim, influences the likelihood that defendants will be sentenced to death. In addition, the General Accounting Office shall examine separately and include in the report, death penalty cases involving crimes similar to those covered under this section.

(p) Sentencing in capital cases in which death penalty is not sought or imposed

If a person is convicted for an offense under subsection (e) of this section and the court does not impose the penalty of death, the court may impose a sentence of life imprisonment without the possibility of parole.

(q) Appeal in capital cases; counsel for financially unable defendants
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(1) In any case in which the sentence of death is imposed under this section, the sentence of death shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time prescribed for appeal of judgment in section 2107 of Title 28. An appeal under this section may be consolidated with an appeal of the judgment of conviction. Such review shall have priority over all other cases.

(2) On review of the sentence, the court of appeals shall consider the record, the evidence submitted during the trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under this section.

(3) The court shall affirm the sentence if it determines that--

(A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(B) the information supports the special finding of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors as set forth or allowed in this section.

In all other cases the court shall remand the case for reconsideration under this section. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence.

(4) (A) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either--

(i) before judgment; or

(ii) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(B) In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(5) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(6) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not



less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(7) With respect to paragraphs (5) and (6), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(8) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(9) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10). Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc.

(10) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of paragraphs (4) through (9).

(r) Refusal to participate by State and Federal correctional employees

No employee of any State department of corrections or the Federal Bureau of Prisons and no employee providing services to that department or bureau under contract shall be required, as a condition of that employment, or contractual obligation to be in attendance at or to participate in any execution carried out under this section if such participation is contrary to the moral or religious convictions of the employee. For purposes of this subsection, the term "participation in executions" includes personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities.

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Citation
21 USCA s 846
21 U.S.C.A. s 846

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UNITED STATES CODE ANNOTATED
TITLE 21. FOOD AND DRUGS
CHAPTER 13--DRUG ABUSE PREVENTION AND CONTROL
SUBCHAPTER I--CONTROL AND ENFORCEMENT
PART D--OFFENSES AND PENALTIES
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s 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

CREDIT(S)

1981 Main Volume

(Pub.L. 91-513, Title II, s 406, Oct. 27, 1970, 84 Stat. 1265.)

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No. 94-8769

Supreme Court, U.S.
FILED
JUN 5 1995
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

TOMMY L. RUTLEDGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DAVID S. KRIS
Attorney

Department of Justice
Washington, D.C. 20530
1202) 514-2217

QUESTION PRESENTED

Whether petitioner's conviction and sentence for drug conspiracy, in violation of 21 U.S.C. 846, must be vacated in light of his conviction and sentence for operating a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848.

IN THE SUPREME COURT OF THE UNITED STATES

3

OCTOBER TERM, 1994

No. 94-8769

TOMMY L. RUTLEDGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 40 F.3d 879.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1994. A petition for rehearing was denied on January 3, 1995. The petition for a writ of certiorari was filed on April 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Central District of Illinois, petitioner was convicted on one count of operating a continuing criminal enterprise (CCE) (Count 1), in

rights under the Double Jeopardy Clause. The court rejected that claim, holding that "[w]hile the conspiracy charge is a lesser included offense of the CCE charge, double jeopardy is not implicated as long as [the] district court does not impose cumulative sentences for the crimes." Pet. App. 9a.

ARGUMENT

Petitioner renews his claim (Pet. 4-15) that the district court violated his double jeopardy rights by entering judgment and imposing sentence on both the CCE and the drug conspiracy. He contends that there is a conflict in the circuits concerning the proper treatment of dual convictions on CCE and drug conspiracy charges.

As we explained in our brief in opposition to the certiorari petition in Wingo v. United States, cert. pending, No. 94-7980, the courts of appeals are divided on that issue.¹ As in Wingo, however, it does not appear that the defendant in this case would suffer any prejudice as a result of the conviction and sentence on the drug conspiracy count. In general, petitioner could suffer prejudice as a result of that conviction and sentence only in two situations, neither of which is likely to occur.

First, the judgment and concurrent sentence on the drug conspiracy count could become significant if petitioner's convictions and sentences of life imprisonment on both the CCE and substantive drug distribution counts were overturned. That is very

¹ We have provided petitioner with a copy of our brief in opposition in Wingo.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DAVID S. KRIS
Attorney

JUNE 1995

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

TOMMY L. RUTLEDGE, PETITIONER)

vs.)

No. 94-8769)

UNITED STATES OF AMERICA)

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 5th day of June 1995.

JEROLD S. SOLOVY
JENNER & BLOCK
ONE IBM PLAZA
CHICAGO, IL 60611

Drew S. Days, III /as
DREW S. DAYS, III
Solicitor General

June 5, 1995

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No. 94-8769

Supreme Court, U.S.
FILED
JUN 13 1995
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

TOMMY L. RUTLEDGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITIONER'S REPLY IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

Jerold S. Solovy
Counsel of Record

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SUPREME COURT OF THE UNITED STATES

No. 94-8769

IN THE SUPREME COURT OF THE UNITED STATES
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PETITIONER'S REPLY IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

The government agrees that the single question raised in this Petition has divided the courts of appeals, and recognizes that "[b]ecause the conflict in the circuits gives no sign of abating . . . the issue may warrant review by this Court in an appropriate case." Brief for the United States in Opposition, Wingo v. United States, cert. pending, No. 94-7980 at 7, 13, adopted in, Brief for the United States in Opposition, Rutledge v. United States, cert. pending, No. 94-8769. Nevertheless, the government maintains that review by this Court is unwarranted in this case because Mr. Rutledge would remain under a life sentence even if this Court were to find a Double Jeopardy Clause violation based on the entry of judgment and imposition of concurrent sentences on both CCE and conspiracy verdicts. (U.S. Br. 3-4.) For two independent reasons, that is not a good reason

to leave a critical and frequently litigated issue in federal criminal law unresolved by declining to review the decision below.

First, the Double Jeopardy Clause plainly applies even to cases where it is not likely to affect the amount of time the defendant will spend in jail. In Ball v. United States, 470 U.S. 856, 865 (1985), this Court held that a second judgment of conviction can violate the Double Jeopardy Clause "even if it results in no greater sentence" and that the judgment itself may qualify as "an impermissible punishment." Neither reason nor authority supports the government's implicit suggestion that the prohibition against multiple punishments for the same offense arises only when they are likely to have a material effect on the defendant's subsequent status as a recidivist, or when one of the convictions is likely to be overturned in the future. (U.S. Br. 3-4.) The Double Jeopardy Clause provides categorical protection against multiple punishments for the same offense, not merely "practical" guarantees concerning the ultimate span of incarceration. This case affords the Court with an excellent opportunity to reaffirm the basic principles of the Double Jeopardy Clause while also resolving an entrenched conflict in the circuits over the application of those principles to a particular set of commonly prosecuted federal crimes.

Second, the government is not justified in speculating that Mr. Rutledge's other convictions and

sentences are invulnerable simply because he has not raised issues concerning them in his Petition. The most basic rules of direct appellate review limit Mr. Rutledge to raising questions in the Petition that properly were preserved in the lower courts. To the extent that Petitioner's previous lawyers rendered ineffective assistance of counsel in the trial court and in the court of appeals by failing to raise in a timely fashion meritorious points as to his trial, convictions and sentences, Mr. Rutledge can properly raise those points in a collateral attack.^{1/} The government has no basis at this time for claiming that Mr. Rutledge's other convictions are "very unlikely" to be overturned. (U.S. Br. 3-4.)

In sum, this is a perfectly appropriate case to resolve the ongoing dispute about the proper application of the Double Jeopardy Clause in the context of combined CCE and conspiracy prosecutions. When this Court denied the petition for a writ of certiorari in United States v. Fernandez, 500 U.S. 948 (1991), three justices dissented, noting that the question now squarely presented in Mr. Rutledge's Petition had caused significant confusion in the circuits. The intervening years have witnessed the compounding of that confusion. The time has come for this Court to settle this important and persistent issue once and for all.

^{1/} As was noted in Mr. Rutledge's Motion for Leave to Proceed In Forma Pauperis Without Affidavit of Indigency Executed By Petitioner, the Seventh Circuit first appointed his current counsel, for the purpose of filing this petition, after it had already affirmed the district court's judgment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jerold S. Solovy
Counsel of Record

Barry Levenstam
Jacob I. Corré
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
312-222-9350
Counsel for Petitioner

Dated: June 13, 1995

Supreme Court, U.S.

F I L E D

JUL 28 1995

(5)
CLERK

No. 94-8769

In The
Supreme Court of the United States
October Term, 1995

—♦—
TOMMY L. RUTLEDGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—♦—
**On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

—♦—
JOINT APPENDIX

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DREW S. DAYS, III
Solicitor General
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Counsel for Respondent

**Petition For Certiorari Filed April 3, 1995
Certiorari Granted June 26, 1995**

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**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES**

| DATE | FILINGS - PROCEEDINGS |
|-------------|--|
| 12/04/91 | Second Superseding Indictment filed against Tommy L. Rutledge |
| 06/25/92 | Jury Verdicts delivered and filed |
| 12/29/92 | Judgment filed by the United States District Court for the Central District of Illinois |
| 11/10/94 | Opinion and Judgment filed by the United States Court of Appeals for the Seventh Cir- cuit |
| 01/03/95 | Rehearing and Rehearing En Banc denied by the United States Court of Appeals for the Seventh Circuit |

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
AT ROCK ISLAND

| | |
|---|---|
| UNITED STATES OF AMERICA, |) |
| Plaintiff, |) Criminal No. |
| v. |) 91-40009 |
| |) |
| TOMMY LEE RUTLEDGE, SHELLY HENSON, RICHARD HAGEMASTER, STAN WINTERS, and DONALD TAYLOR, |) VIO: Title 18, United States Code, Sections 2, 922(g) and 924(c); Title 21, United States Code, Sections 841(a)(1), 846 and 848 |
| Defendants. |) |

SECOND SUPERSEDING INDICTMENT

The Grand Jury charges:

COUNT 1

Beginning in or about early 1988 and continuing at least until in or about late 1990, in Warren County, Illinois, within the Central District of Illinois, and elsewhere,

TOMMY LEE RUTLEDGE,
the defendant herein, knowingly and intentionally did engage in a continuing criminal enterprise, namely a series of violations of Title 21, United States Code, Sections 841(a)(1) and 846 by repeatedly distributing and possessing with intent to distribute quantities of cocaine, which continuing series of violations were undertaken by

TOMMY LEE RUTLEDGE

in concert with at least five (5) other persons with respect to whom

TOMMY LEE RUTLEDGE

occupied positions of organizer, supervisor, and other positions of management, and from which continuing series of violations

TOMMY LEE RUTLEDGE

obtained substantial income and resources.

2. As part of this continuing criminal enterprise, the defendant,

TOMMY LEE RUTLEDGE,

committed and caused to be committed numerous acts, including but not limited to the acts set forth hereinafter in Counts 3, 4 and 5, which counts are incorporated by reference as if fully set forth here.

In violation of Title 21, United States Code, Section 848.

COUNT 2

1. Beginning in or about early 1988, and continuing until in or about late 1990, in Warren County, within the Central District of Illinois and elsewhere,

TOMMY LEE RUTLEDGE,
SHELLY HENSON,
RICHARD HAGEMASTER,
STAN WINTERS, and
DONALD TAYLOR,

the defendants herein, did knowingly combine, conspire and agree with each other and both with persons known and with persons unknown to the grand jury to commit certain acts in violation of the laws of the United States, to-wit: (a) to knowingly possess with intent to distribute cocaine, a Schedule II controlled substance; and (b) to knowingly distribute cocaine, a Schedule II controlled substance, both in violation of Title 21, United States Code, Section 841(a)(1).

2. Over the course of the conspiracy that the defendants distributed and caused to be distributed in excess of 5 kilograms of cocaine.

OVERT ACTS

3. In furtherance of the conspiracy and to accomplish its objects of possessing with intent to distribute and distributing cocaine, the defendants and other persons both known and unknown to the grand jury did commit overt acts, including but not limited to the following:

1. In late 1988, Richard Hagemaster delivered cocaine to an individual for Tommy Lee Rutledge;

2. In early 1989, Tommy Lee Rutledge and Donald Taylor travelled to Iowa to purchase cocaine;

3. In January, 1989, Tommy Lee Rutledge and Shelly Henson distributed cocaine to an individual;

4. In mid-1990, Stan Winters delivered cocaine to an individual for Tommy Lee Rutledge.

All in violation of Title 21, United States Code, Section 846.

COUNT 3

In or about January, 1989, in Warren County, within the Central District of Illinois,

TOMMY L. RUTLEDGE, and
SHELLY HENSON,

the defendants herein, did knowingly distribute cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT 4

On or about July 14, 1989, in Warren County, within the Central District of Illinois,

TOMMY L. RUTLEDGE,

the defendant herein, did knowingly possess a firearm which had previously travelled in interstate or foreign commerce, to-wit: numerous shotguns, rifles and pistols, the defendant having been previously convicted under the laws of the State of Illinois of a crime punishable by imprisonment for a term exceeding one year.

In violation of Title 18, United States Code, Section 922(g).

COUNT 5

In or about July, 1989, in Warren County, within the Central District of Illinois,

TOMMY LEE RUTLEDGE,

the defendant herein, did knowingly use and carry a firearm during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States, that is the distribution of cocaine, in violation of Title 21, United States Code, Section 841.

In violation of Title 18, United States Code, Section 924(c).

COUNT 6

On or about July 14, 1989, in Warren County, within the Central District of Illinois,

TOMMY LEE RUTLEDGE,

the defendant herein, did knowingly use and carry a firearm during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States, that is, the distribution of controlled substances and the possession of controlled substances with intent to distribute, in violation of Title 21, United States Code, Section 841.

In violation of Title 18, United States Code, Section 924(c).

A True Bill,

/s/ Illegible
Foreperson

/s/ J. William Roberts by Byron Illegible
J. WILLIAM ROBERTS
UNITED STATES ATTORNEY

**United States District Court
CENTRAL District of ILLINOIS**

UNITED STATES
OF AMERICA

v.

TOMMY L. RUTLEDGE

**JUDGMENT IN A
CRIMINAL CASE
(For Offenses Committed
On or After
November 1, 1987)**

Case Number: 91-40009-01
(Filed Dec. 29, 1992)

(Name of Defendant)

Howard Vincent Thomas
Defendant's Attorney

THE DEFENDANT: Tommy L. Rutledge

- pleaded guilty to count(s) _____
XX was found guilty on count(s) 1-6 of the second superseding indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---------------------|---|------------------------|-----------------|
| 21:848 | Continuing Criminal Enterprise | 12/1/90 | 1 |
| 21:846 | Conspiracy to possess with intent to distribute & to distribute cocaine, a schedule II controlled substance | 12/1/90 | 2 |
| 21:841(a)(1) & 18:2 | Distribution of cocaine, a schedule II controlled substance | 12/1/90 | 3 |

| | | | |
|------------|----------------------------------|---------|-------|
| 18:922(g) | Felon in possession of a firearm | 12/1/90 | 4 |
| 18:9249(c) | Armed drug trafficker | 12/1/90 | 5 & 6 |

The defendant is sentenced as provided in pages 2 through 12 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).
- XX Count(s) original cts. 1-3 & 1st superseding counts 1-3) ~~(is)(are)~~ dismissed on the motion of the United States.
- XX It is ordered that the defendant shall pay a special assessment of \$300.00, for count(s) 1-6 of second superseding indictment which shall be due X immediately as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

| | |
|---|---|
| Defendant's Soc. Sec. No.: <u>361-38-1590</u> | <u>December 23, 1992</u> |
| Defendant's Date of Birth: <u>06-11-47</u> | Date of Imposition of Sentence |
| Defendant's Mailing Address: <u>in custody</u> | /s/ <u>Michael M. Mihm</u> Signature of Judicial Officer <u>MICHAEL M. MIHM-</u> <u>CHIEF, U.S. DISTRICT</u> <u>JUDGE</u> |
| Defendant's Residence Address: <u>in custody</u> | Name & Title of Judicial Officer <u>December 29, 1992</u> Date |

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of life on Count 1 of 2nd Superseding Indictment: life without possible release to run concurrent to Count 1 on Count 2 of the 2nd superseding indictment; life without possible release to run concurrent to Counts 1 & 2 on Count 3 of the 2nd superseding indictment; ten (10) years on Count 4 of the 2nd superseding indictment [sic] to run concurrent with counts 1, 2 & 3; sixty (60) months on Count 5 of the 2nd superseding indictment to run consecutive to counts 1, 2, 3, 4 & 6; one hundred twenty (120) months on Count 6 of the 2nd superseding indictment to run consecutive to Counts 1, 2, 3, 4 & 5.

- The court makes the following recommendations to the Bureau of Prisons:
- XX The defendant is remanded to the custody of the United States marshal.

— The defendant shall surrender to the United States marshal for this district.

— at _____ a.m.
— at _____ p.m. on _____
— as notified by the United States marshal.

— The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

— before 2 p.m. on _____
— as notified by the United States marshal.
— as notified by the probation office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States Marshal
By _____
Deputy Marshal

FINE

The defendant shall pay a fine of \$ _____. The fine includes any costs of incarceration and/or supervision.

— This amount is the total of the fines imposed on individual counts, as follows:

NO FINE, COSTS OF INCARCERATION OR RESTITUTION ARE APPROPRIATE.

— The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

— The interest requirement is waived.

— The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

— in full immediately.

— in full not later than _____.

— in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

— in installments according to the following schedule of payments:

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

() The Court adopts the factual findings and guideline application in the Presentence Report.

OR

(X) The Court adopts the factual findings and guidelines application in the Presentence Report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 40

Criminal History Category: VI

Imprisonment Range: Counts 1-4: to life months
Count 5: 5 years & Count 6: 10 years

Count 1: 20 years

Counts 2 & 3: life

Count 5: 5 years

Mandatory Min: Count 6: 10 years

Supervised Release Range: 3 to 5 years

Count 1: 3-5 years; Counts 2 & 3: N/A; Counts 4, 5 & 6: 2-3 years

Fine: \$25,000 to \$8,000,000.00

(XX) Fine is waived or is below the guideline range because of the defendant's inability to pay.

Restitution: \$N/A

() Full restitution is not ordered for the following reason(s):

() The sentence is within the guideline range, that range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by application of the guidelines.

OR

(XX) The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons: pursuant to the statutory enhancements of life imprisonment

OR

The sentence departs from the guideline range

- upon motion of the Government, as a result of defendant's substantial assistance.
 - for the following reasons:
- * * *
-

RE: RUTLEDGE, Tommy Lee

**ADDENDUM II TO THE PRESENTENCE REPORT
DATED 09/23/92 AND REVISED 10/29/92**

NAME: RUTLEDGE, Tommy Lee

DOCKET NO. 91-40009-01

The following objections were raised by the Government and defendant and ruled on by the Court at the December 23, 1992, Sentencing Hearing.

OBJECTIONS

By the Government

- I. Reference page 26, paragraph 146
 - A. The Government objects to paragraph 146 as a consecutive term of imprisonment of 60 months must be imposed on Count 5, and a consecutive term of imprisonment of 120 months must be imposed on Count 6.
 - B. The defendant neither objects nor concurs with the Government.

Court's Findings.

1. Court adopts probation officer's position.
2. X Court adopts Government's position.
3. Court adopts defendant's position.
4. Other: _____

By the DefendantI. Reference page 19, paragraph 105

- A. The defendant objects to paragraph 105 as the conviction in this paragraph was reversed and overturned by the State of Illinois Appellate Court. Therefore, the three criminal history points documented in this paragraph should be deleted.
- B. The position of the Government and probation office concurs with that of the defendant.

Court's Findings

- Court adopts probation officer's position.
- Court adopts Government's position.
- Court adopts defendant's position.
- Other: _____

II. Reference page 19, paragraph 109

- A. The defendant objects to paragraph 109 as the conviction contained in this paragraph was reversed and overturned by the State of Illinois Appellate Court. Therefore, the two criminal history points contained in this paragraph should be deleted.
- B. The position of the Government and probation office concurs with that of the defendant.

Court's Findings

- 1. Court adopts probation officer's position.
- 2. Court adopts Government's position.
- 3. Court adopts defendant's position.
- 4. Other: _____

III. Reference page 21, paragraph 113

- A. The defendant objects to paragraph 113 as the conviction contained in this paragraph was in regards to his son, Thomas L. Rutledge Jr., and not the defendant. Therefore, the one criminal history point contained in this paragraph should be deleted.
- B. The position of the Government and the probation office concurs with that of the defendant.

Court's Findings

- 1. Court adopts probation officer's position.
- 2. Court adopts Government's position.
- 3. Court adopts defendant's position.
- 4. Other: _____

IV. Reference page 21, paragraphs 114 and 115

- A. The Defendant objects to the additional criminal history points contained in these paragraphs.
- B. The position of the Government and probation office remains as stated in paragraphs 114 and 115.

Court's Findings

1. Court adopts probation officer's position.
2. Court adopts Government's position.
3. Court adopts defendant's position.
4. Other: _____

V. Reference page 23, paragraph 131

- A. The defendant objects to paragraph 131 as the arrest contained in this paragraph involved the defendant's son, Thomas L. Rutledge Jr., and not the defendant.
- B. The position of the Government and probation office concurs with that of the defendant.

Court's Findings

1. Court adopts probation officer's position.
2. Court adopts Government's position.
3. Court adopts defendant's position.

4. Other: _____

VI. Reference pages 13, 14, and 17, paragraphs 85, 86, 87, and 98

- A. The defendant objects to these paragraphs as he never made death threats against any witnesses, codefendants, or U.S. Attorneys.
- B. The position of the Government and probation office remains as stated in paragraphs 85, 86, 87, and 98.

Court's Findings

1. Court adopts probation officer's position.
2. Court adopts Government's position.
3. Court adopts defendant's position.
4. Other: The Court found the defendant did threaten witnesses and codefendants. However, the Court was unable to determine if the letter (poem entitled "Satan Letter") prepared by the defendant was intended to be threatening.

VII. Reference Offense Conduct

- A. The defendant objects to all statements by all the codefendants concerning the quantities of cocaine, arson, and trade of weapons as all of these statements are untrue and based upon mere heresay [sic].
- B. The position of the Government [sic] and probation office remains as stated in the

Offense Conduct section of the Presentence Report.

Court's Findings

1. Court adopts probation officer's position.
2. Court adopts Government's position.
3. Court adopts defendant's position.
4. Other: _____

VIII. Reference page 3, paragraph 14

- A. The defendant objects to paragraph 14 as Richard Hagemaster never delivered cocaine for the defendant, Tom Rutledge and Don Taylor never traveled to Iowa to purchase cocaine, Tom Rutledge and Shelly Henson never distributed cocaine, and Stan Winters never delivered cocaine for Tom Rutledge.
- B. The position of the Government and probation office remains as stated in paragraph 14.

Court's Findings

1. Court adopts probation officer's position.
2. Court adopts Government's position.
3. Court adopts defendant's position.
4. Other: _____

IX. Reference page 3, paragraph 16

- A. The defendant objects to paragraph 16 as he did not possess numerous firearms at any time.
- B. The position of the Government and probation office remains as stated in paragraph 16.

Court's Findings

1. Court adopts probation officer's position.
2. Court adopts Government's position.
3. Court adopts defendant's position.
4. Other: _____

X. Reference page 3, paragraph 17

- A. The defendant did not carry a firearm or carry a firearm during and in relation to any drug trafficking crime. Further, the U.S. Government dismissed the charges against Tom Rutledge for possessing firearms on or about July 14, 1989.
- B. The position of the Government and probation office remains as stated in paragraph 17.

Court's Findings

1. Court adopts probation officer's position.
2. Court adopts Government's position.
3. Court adopts defendant's position.

4. Other: _____

XI. Reference page 5, paragraphs 29, 30, and 31

- A. The defendant objects to these paragraphs as Rick Bolen did not testify during the trial and cannot be considered a credible witness.
- B. The position of the Government and probation office remains as stated in paragraphs 29, 30, and 31.

Court's Findings

- 1. Court adopts probation officer's position.
- 2. Court adopts Government's position.
- 3. Court adopts defendant's position.
- 4. Other: _____

XII. Reference Offense Conduct

- A. The defendant objects to the offense conduct as he did not possess, sell, or distribute or conspire to do any drug transactions.
- B. The position of the Government and probation office remains as stated in the Offense Conduct section of the Presentence Report.

Court's Findings

- 1. Court adopts probation officer's position.
- 2. Court adopts Government's position.
- 3. Court adopts defendant's position.
- 4. Other: _____

XIII. Reference page 5, paragraph 33

- A. The defendant objects to paragraph 33 as he did not visit Mustread in Galesburg, Illinois, and he did not purchase 4 ounces of cocaine.
- B. The position of the Government and probation office remains as stated in paragraph 33.

Court's Findings

- 1. Court adopts probation officer's position.
- 2. Court adopts Government's position.
- 3. Court adopts defendant's position.
- 4. Other: The Court found that defendant Rutledge did not visit Mustread in Galesburg, Illinois. However, the Court did find that the defendant purchased 4 ounces of cocaine while with Mustread.

XIV. Reference page 6, paragraph 35

- A. The defendant objects to paragraph 35 as John Wilson was called as a defense witness at trial and testified that he did not trade defendant Rutledge a Ruger rifle for cocaine.

B. The position of the Government and probation office remains as stated in paragraph 35.

Court's Findings

1. Court adopts probation officer's position.
 2. Court adopts Government's position.
 3. Court adopts defendant's position.
 4. Other: _____
-

CERTIFIED BY

/s/ Wade B. Maddox
WADE B. MADDOX
U.S. Probation Officer

Reviewed and Approved:

/s/ Roger C. Ahrens
ROGER C. AHRENS
Deputy Chief U.S. Probation Officer
Date: 12/23/92

The Court adopts the above-listed findings on December 23, 1992.

/s/ Michael M. Mihm
HONORABLE MICHAEL M. MIHM
Chief U.S. District Judge

In the
**United States Court of Appeals
for the Seventh Circuit**

Nos. 93-1122, 93-2652, & 93-2653

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TOMMY L. RUTLEDGE, SHELLY HENSON,
and RICHARD HAGEMASTER

Defendants-Appellants.

Appeal from the United States District Court
for the Central District of Illinois.
No. 91 CR 40009 – Michael M. Mihm, *Chief Judge.*

ARGUED SEPTEMBER 9, 1994 – DECIDED NOVEMBER 10, 1994

Before BAUER, and FLAUM, *Circuit Judges*, and FOREMAN,* *District Judge.*

BAUER, *Circuit Judge.* A jury convicted Tommy Lee Rutledge, Shelly Henson, Richard Hagemaster, and Stan Winters of conspiring to distribute cocaine in violation of 21 U.S.C. § 848. Additionally, the jury convicted Rutledge

* The Honorable James L. Foreman, of the United States District Court for the Southern District of Illinois, is sitting by designation.

of conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848, distribution of cocaine in violation of 21 U.S.C. § 841(a)(1), possession of a firearm by a felon in violation of 18 U.S.C. § 924(g), and using or carrying a firearm during the commission of a drug felony in violation of 18 U.S.C. § 924(c). Rutledge, Henson, and Hagemaster appealed citing a surfeit of defects in their collective prosecution. Because we find no merit to their arguments, we affirm.

I. Facts

In November 1986, after his release from prison, Rutledge began dealing cocaine, a formative step that would soon develop into an extensive drug distribution network. From his base in Chicago, Rutledge would travel every two weeks to Astoria, Illinois to deliver up to two ounces of cocaine to Roger Malott. Soon thereafter, Rutledge moved to Youngstown, Illinois and put Malott to work for him, delivering cocaine and collecting debts resulting from drug sales. Rutledge's initial source of cocaine was Juan Gonzalez of Burlington, Iowa, an acquaintance of Rutledge's from prison and a member of the Latin Kings street gang based in Chicago.

Over the next several months, Rutledge, convinced several people to join his enterprise, including Shelly Henson, Richard Hagemaster, Rick Bolen, Randy Mustread, Kim Mummert, Tom Crowe, and Stan Winters. At one point, to demonstrate to Bolen that he was a major drug dealer and to convince him to join his outfit, Rutledge showed Bolen fifty pounds of marijuana and

one-eighth of a pound of cocaine stored in the trunk of his car.

Rutledge's methods of doing business were in many ways similar to those of his peers in the drug business. Firearms figured prominently in Rutledge's enterprise. Not only did he maintain a cache of weaponry to protect himself, his employees, and his inventory of drugs, Rutledge also trafficked in firearms. He was more than happy to trade firearms for cocaine and receive firearms in payment for cocaine shipments.

As if the constant presence of firearms was not enough, Rutledge used his connections with the Latin Kings (presumably forged during one of his stints in prison) to maintain control over his operation. He frequently invoked the name of the Latin Kings to intimidate employees and customers alike. Rutledge, however, reserved his most ominous invocation of the Latin Kings for his employees to ensure that no employee would implicate him in this drug enterprise. We will expand on Rutledge's use of this tactic shortly.

At some point during the course of his cocaine conspiracy, Rutledge changed the source of his cocaine; he began to buy cocaine from Roberto Laurel, a member of the Latin Kings in Chicago. Consistent with his *modus operandi*, Rutledge also traded arms with Laurel. To execute his transactions with Laurel, Rutledge would travel with, or send to Chicago in varying combinations, Malott, Mustread, Henson, and Mummert.

From November 1988 through July 1989, Rutledge's base of operations was a trailer he shared with Mummert,

Henson, and Hagemaster in Youngstown. Rutledge supported these three and provided them with cocaine. At this time, Rutledge employed Malott and Crowe in addition to his roommates. Henson, however, moved out of the trailer in July 1989 and terminated her association with Rutledge.

Henson's departure was likely hastened when Rutledge was arrested in the trailer in July 1989 by the Illinois State Police on the basis of statements made by Malott that Rutledge was involved with drugs and guns. The arresting officers discovered Rutledge's cache of weapons, but apparently found no drugs. When he learned of Malott's statement to the police, Rutledge threatened Malott with serious harm if Malott testified against him in court. Rutledge made similar threats to Mummert. Rutledge's intimidation succeeded; both Malott and Mummert testified before a state grand jury that Rutledge was not involved with drugs or guns. Rutledge was subsequently released.

Rutledge continued his drug operation until he was arrested by federal authorities in December 1990. Rutledge, Henson, Hagemaster, and Winters were indicted in February 1991. Malott, Mummert, Mustread, and a frequent customer of Rutledge's, Michael Wright, cooperated with the government and testified as to their experiences with Rutledge and his drug ring.

II. Analysis

A. Tommy Lee Rutledge

Rutledge's first argument is that he was denied a fair trial because two or three jurors encountered Rutledge in handcuffs outside the courtroom during the course of the trial. He contends that the trial court should have *voir dire'd* those jurors to determine whether Rutledge was prejudiced by this incident. As we shall explain, Rutledge received a trial as fair as possible given his own conduct, and the trial court handled the situation perfectly.

On the first afternoon of the trial, Rutledge made a statement to the Deputy United States Marshals to the effect of "what if I take off now?"¹ While the deputies believed that Rutledge was not serious in his threat, they discussed the situation and decided that Rutledge must be handcuffed going to and from the courtroom. On the morning of the second day of the trial, the prosecutor brought this incident to the attention of the trial judge, who approved handcuffing Rutledge.

To ensure that no jurors saw Rutledge being taken out of the courtroom in handcuffs, the deputies adopted certain procedures for bringing Rutledge in and out of the courtroom. Prior to taking Rutledge out of the courtroom, one deputy would check the outer hallway to ascertain whether any jurors were present. If the hallway was clear, the deputies would then lead Rutledge out of

¹ Deputy Kevin Jackson reported that he did not recall exactly what Rutledge had said but that it was a statement similar to "what if I take off now?" or "what if I flee?"

the courtroom into that outer hallway. Unfortunately, these measures were not foolproof.

At one point during the trial, two or three jurors briefly saw Rutledge in handcuffs. The deputies followed the procedures they had adopted for Rutledge, but the jurors entered the hallway just after it was checked. It is unclear whether at first glance the jurors necessarily knew that Rutledge was handcuffed; just to make sure that none of the jurors missed it, Rutledge raised his handcuffed hands in an exaggerated manner to show the jurors his handcuffs. Rutledge was immediately led away so that no additional jurors were treated to a similar demonstration.

The parties immediately brought this incident to the attention of the trial judge. The trial judge then offered to give the jury a cautioning instruction regarding the incident. He continued:

What I would suggest is that I simply make a statement to the jury that it has come to my attention that some of the jurors may have become aware of the fact that he is in custody and that's a reality in this case and I will caution them that the fact that he is in custody should not in any way be considered by them as any evidence or suggestion of guilt. Is that how you want to handle it or would you suggest something else?

After conferring with his client, Rutledge's counsel stated: "We would like to just skip it, your Honor."

Rutledge claims that such a sighting by jurors of a defendant in handcuffs is inherently prejudicial. Therefore, he argues that a curative instruction from the trial

judge is obviously insufficient and that, in this case, the trial judge, *sua sponte*, should have *voir dire'd* the jurors in question. Rutledge did not request such a *voir dire* from the judge at the time it happened. We believe this omission combined with Rutledge's failure to present any evidence from which we might find that he suffered actual prejudice resulting from this incident demonstrates that this argument lacks merit.

While we believe that this may be the first time that we have been squarely presented with this issue, we recently noted that "[c]ourts have generally found inadvertent sightings of shackles by the jury to be insufficient to demonstrate prejudice." *Woods v. Thieret*, 5 F.3d 244, 248 n.5 (7th Cir. 1993) (citing *Harrell v. Israel*, 672 F.2d 632, 637 (7th Cir. 1982) (citations omitted)). We therefore categorically reject Rutledge's argument that prejudice automatically inheres in a trial when a juror inadvertently sees a defendant in handcuffs. Our position is in accord with other circuits that have addressed this issue. See e.g., *United States v. Ware*, 897 F.2d 1538, 1542 (10th Cir.), cert. denied, 496 U.S. 930 (1990); *United States v. Garcia-Rosa*, 876 F.2d 209, 236 (1st Cir. 1989); *United States v. Halliburton*, 870 F.2d 557, 561 (9th Cir.), cert. denied, 492 U.S. 910 (1989). In situations such as this one, we hold that the defendant bears the burden of proving that he has suffered actual prejudice. See, e.g., *Garcia-Rosa*, 876 F.2d at 236. Here, neither Rutledge nor the record indicate that Rutledge has suffered actual prejudice.

The trial judge, in the best position to evaluate such things, stated on the record that he believed that Rutledge suffered no prejudice. In addition, the trial

judge not only offered a curative instruction, but specifically asked Rutledge's counsel what she wanted done. In a decision that was likely well-informed by her trial experience and reached after consultation with her client, Rutledge's counsel decided that dwelling on the incident was unwise. Her failure to request the *voir dire* at this time supports our belief that Rutledge's encounter with the jurors had no effect on his trial and that this encounter could only have prejudiced him if the jurors had been browbeaten about it.

The task of trying cases is one of dizzying pace and fraught with unexpected twists and turns. All parties to this trial (save Rutledge himself) surely sought to prevent the very incident that happened in this case, but it happened nevertheless. The trial judge acted swiftly and offered Rutledge the remedy of his choice. If Rutledge's counsel had been hell-bent on *voir dire*'ing the jurors, she had ample opportunity to request that of the trial judge. Rutledge and his counsel thought it best to put the incident behind them and move on; the trial judge agreed. We believe Rutledge suffered no prejudice, that the trial judge and Rutledge's counsel recognized that there was no prejudice and that the trial judge handled this incident properly.²

² Because Rutledge suffered no prejudice from the jurors' inadvertent sighting of him in handcuffs, we refrain from discussing Rutledge's role in creating whatever effect there may have been on his trial. Suffice it to say that defendants are well-advised to act as diligently as the court personnel in avoiding this type of incident.

Rutledge next complains of the admission of certain testimony by Malott linking Rutledge with the Latin Kings. He claims that this testimony was offered to inflame the jury, that its prejudicial effect greatly outweighed its probative value, and that it should have been excluded, apparently pursuant to Federal Rule of Evidence 403. We disagree.

Malott testified that after Rutledge was arrested in July 1989, he cooperated with agents from the Illinois State Police by giving them a statement concerning Rutledge's drug operation. Later, Malott discovered that Rutledge had obtained a copy of Malott's statement upon his release from prison. Rutledge then contacted Malott by telephone to inform Malott that Rutledge had a bullet with Malott's name on it. The two men met, and Rutledge showed Malott his copy of Malott's statement. Rutledge then waived a handgun at Malott and said:

We're going to have to get this straightened out. You know, I can have the Latin Kings down here in two hours to take care of this. I'm not going to jail for twenty years over your lying, making these kind of statements.

One week after Rutledge threatened Malott, Malott discovered a copy of his statement affixed to the side window of his truck; the letters "LK" were spray-painted in red on the statement. Two days later, three Hispanic men, believed by Malott to be members of the Latin Kings, drove their car into the driveway of Malott's home. Malott scared them off by brandishing a shotgun.

Rutledge's threats were enough to cause Malott to perjure himself before the state grand jury by denying

that Rutledge operated a drug ring. At trial, the government offered Malott as one of its principal witnesses against Rutledge and the others. The government offered Malott's testimony describing Rutledge's threats, which necessarily invoked Rutledge's gang affiliation, to meet what it expected to be vigorous attempts to impeach Malott on the basis of his prior inconsistent statements before the state grand jury. Over objections, the trial judge allowed Malott to testify to Rutledge's threats. As expected, counsel for each defendant extensively cross-examined Malott about his previous perjury.

Rule 403 operates to exclude otherwise relevant evidence only if its probative value is substantially outweighed by its potential to create unfair prejudice to the defendant. In this instance, the trial court determined that Malott's testimony regarding Rutledge's threats should not be excluded. We review the trial court's decision to admit evidence for an abuse of that court's discretion. *See, e.g., United States v. Williams*, 31 F.3d 522, 527 (7th Cir. 1994). It is clear to us that the district court did not abuse its discretion in admitting this aspect of Malott's testimony.

Naturally, the vast majority of the government's evidence against a defendant is prejudicial to him. That's the idea. But in order to find that a particular piece of evidence must be excluded pursuant to Rule 403, its probative value must be insignificant compared to its inflammatory nature so that the evidence unfairly prejudices the defendant. That is not the case here. The government had a right to rehabilitate Malott as a witness by explaining his prior perjury; to do so, Malott was required to recount the reasons that he had perjured

himself. Rutledge does not deny that Malott's testimony is true, he simply claims that his testimony is too prejudicial.

Rutledge seems to argue that simply connecting a defendant with a gang constitutes unfair prejudice that substantially outweighs any probative value. We have approved, however, the admissibility of evidence of gang affiliation in a number of cases for a number of purposes. *See, e.g., United States v. Rodriguez*, 925 F.2d 1049, 1053 (7th Cir. 1991); *United States v. Lewis*, 910 F.2d 1367, 1372 (7th Cir. 1990) (collecting cases). More specifically, we have permitted its admissibility to explain a witness's prior inconsistent statement made out of fear of gang retaliation. *United States ex rel. Garcia v. Lane*, 698 F.2d 900, 902 (7th Cir. 1983). Malott's testimony regarding Rutledge's threats was highly probative evidence explaining Malott's prior inconsistent statement, and the trial court did not abuse its discretion in admitting it.

Rutledge's third argument is that because Rick Bolen did not testify at trial or at the sentencing hearing all statements attributed to him in the presentence report should have been omitted. He claims that because he was unable to cross-examine Bolen, Bolen's statements do not have the requisite indicia of reliability. Rutledge misperceives the reliability requirement.

At the sentencing hearing, Rutledge objected to the district court's consideration of Bolen's statements in the presentence report. Bolen's statements told of the incident in which Rutledge showed Bolen the marijuana and cocaine in the trunk of Rutledge's car and of other occasions on which Bolen accompanied Rutledge to Iowa to

deliver or obtain cocaine. To establish Bolen's reliability, the government called the case agent, Bruce Harmening. Harmening testified that he had compared the statements in the presentence report given by Bolen with the statements and trial testimony of other witnesses and with the physical evidence and found no significant inconsistencies. He testified that there were some minor inconsistencies, such as a variance of a few days with respect to dates of excursions to obtain drugs and slight differences in estimations as to the amount of cocaine Rutledge sold weekly. The district court found Harmening's testimony sufficient to support the probation officer's position in the presentence report.

The court then informed Rutledge that in order to challenge Bolen's statements, he must present evidence in addition to a simply denial demonstrating that Bolen's statements were not true. Rutledge discussed with his counsel whether to present any such evidence during a brief recess. They then informed the court that they would not present any evidence.

The district court conducted this aspect of Rutledge's sentencing hearing precisely in accordance with the controlling case in this circuit, *United States v. Coonce*, 961 F.2d 1268 (7th Cir. 1992). In *Coonce*, we articulated the proper procedure for contesting facts upon which a district court relies to sentence a defendant. We stated:

First, the defendant must challenge the facts in the presentence report . . . as being unreliable or incorrect. Having done so, and assuming the facts as presented bear sufficient indicia of reliability, the defendant must carry the burden of presenting some evidence beyond a mere

denial calling the reliability or correctness of the alleged facts into question. If the defendant meets this burden of production, the burden of persuasion then shifts back to the prosecution, who in turn must convince the court that the facts presented by the government are actually true.

Id. at 1280. Rutledge contends that the facts he has called into question, Bolen's statements, do not bear an indicia of reliability sufficient to trigger his burden of production under *Coonce*. He claims that Bolen's statements are simply naked assertions; as a result, he asserts that *Coonce* permits a mere denial to render them inapplicable in sentencing.

As an initial matter, Bolen's statements are not simply naked assertions. Plenty of other witnesses intimately involved in Rutledge's operation testified about his drugs and guns; that Bolen's statements are consistent with these other accounts indicates that they are based in fact. See *United States v. Westbrook*, 986 F.2d 180 (7th Cir. 1993). In addition, this consistency coupled with Harmening's testimony adequately support the district court's finding that Bolen's statements bear a sufficient indicia of reliability. Rutledge's challenge to these statements, therefore, fails.

Rutledge's fourth and final argument is that his Fifth Amendment rights have been violated because he was convicted and sentenced for operating a continuing criminal enterprise and for conspiracy to distribute cocaine. The Double Jeopardy Clause of the Fifth Amendment protects defendants from being tried and punished for the same offense twice. While the conspiracy charge is a

lesser included offense of the CCE charge, double jeopardy is not implicated as long as district court does not impose cumulative sentences for the crimes. *United States v. Bond*, 847 F.2d 1233, 1238 (7th Cir. 1988); *see also United States v. Jeffers*, 432 U.S. 137, 157-58 (1977). This is because:

[O]ne can *both* conspire (agree to run a drug business) and run a continuing criminal enterprise (strike the agreement and succeed). . . . The statutes reach the same group of persons. It is not illogical to convict a person of both agreeing to do something (§ 846) and succeeding on a grand scale (§ 848).

Bond, 847 F.2d at 1238. Concurrent sentences may be imposed for conspiracy and CCE provided the cumulative punishment does not exceed the maximum under the CCE act. *United States v. Bafia*, 949 F.2d 1465, 1473 (7th Cir. 1991); *Bond*, 847 F.2d at 1239.

In this case, the district court sentenced Rutledge to life imprisonment on his CCE conviction and life imprisonment on the conspiracy conviction to run concurrently with the CCE sentence. The maximum penalty under the CCE act at the time of Rutledge's sentencing was life imprisonment. Thus, by imposing concurrent sentences, the district court did not impose a cumulative penalty, and Rutledge's sentence is proper.

B. Shelly Henson

Henson's first argument is that the government's evidence against her is insufficient to support her conviction. In her brief, she went so far as to say: "Clearly, there

was no specific evidence as to Shelly Henson's role in regard to said conspiracy." We disagree; the government presented evidence that overwhelmingly supports Henson's conviction.

In reviewing Henson's claim, we must review the evidence in a light most favorable to the government, drawing all reasonable inferences. Then, we must ascertain whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

The government's evidence featured testimony from several witnesses intimately involved in Rutledge's drug conspiracy. Kim Mummert testified that Henson obtained cocaine for Rutledge, sold drugs that she received from Rutledge while living with him in the trailer, and helped pay the bills with money she earned selling Rutledge's drugs. Randy Mustread testified that Henson sold cocaine for Rutledge, delivered cocaine for him, and collected payment. Roger Malott testified that Henson cut cocaine for Rutledge, delivered cocaine for him, and collected payment. Malott also testified that Henson kept Rutledge's accounts regarding drug transactions. Michael Wright testified that Henson arranged cocaine sales for Rutledge and collected payments. The government's evidence easily supports Henson's conviction.

Henson next argues that the district court abused its discretion by admitting evidence of a pistol she had in her possession. Although the district court provided the jury with several instructions regarding the limited purposes for which they could consider this evidence, Henson maintains that the jury was unable to follow these

instructions. The district court properly admitted this evidence.

The gun was obtained by authorities from Henson when she and Wright were arrested in early 1989 in possession of one ounce of cocaine. The .25 caliber semi-automatic handgun and ammunition were found in Henson's purse. The police also found in Henson's purse Western Union money transfers which represented payment for drugs that Rutledge purchased from Randy Mustread.

The gun was introduced by Illinois State Police Special Agent Bruce Kettlekamp, who testified that he had discovered the gun in Henson's purse during the course of her arrest. Henson's counsel objected to the gun's relevancy, and district court overruled the objection and admitted the testimony for the limited purposes of showing a connection between Rutledge and Henson and for supporting the weapons charges against Rutledge. An ATF agent then testified as to the chain of custody of the gun, at which time the district court again reminded the jury of the limited purposes of the testimony regarding the gun. In addition, Wright, Mustread, and Malott all testified that Henson carried the gun, which was given to her by Rutledge ostensibly for her protection. During the testimony of each of these witnesses, the district court again admonished to consider the testimony for Henson's connection to Rutledge and with respect to Rutledge's gun charge.

It is clear that the district court addressed this situation perfectly. The government properly presented this evidence to demonstrate Henson's role in Rutledge's

drug enterprise and to connect Rutledge to the gun. Any potential for prejudice to Henson was snuffed out by the district court's repeated warnings to the jury. And, of course, we presume that jurors do what they are told. *See, e.g., United States v. Scott*, 19 F.3d 1238, 1244 (7th Cir. 1994) (citations omitted). The district court therefore properly admitted the evidence of the gun.

Henson next argument centers on a statement made by a prosecutor during closing argument. At that time, one of the prosecutors commented on the credibility of a defense witness. The prosecutor commented that this witness claimed that she saw Roger Malott near her home during the time in which Malott was in custody. The prosecutor then stated that "[t]he defense should have been embarrassed to hear her say that." Henson's counsel immediately objected, and the district court sustained the objection. The prosecutor went on to state that the witness' testimony was a physical impossibility, to which Henson's counsel did not object. Henson argues that the prosecutor's statement was so prejudicial to her that she requires a new trial.

We evaluate the prosecutor's comments to determine whether they were improper. *United States v. Neely*, 980 F.2d 1074, 1084-85 (7th Cir. 1993). If so, a new trial is warranted only if "the prosecutor's comments infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citation omitted). The prosecutor's comments in this case, while improper, do not remotely rise to the level of a due process violation. They were directed at a witness for another defendant and did not bear at all on the evidence presented against Henson.

Also, the judge quickly granted Henson's counsel's objection, and Henson's counsel had ample opportunity to counter the prosecutor's comments during the course of her argument. Finally, the evidence was so overwhelmingly against Henson on the conspiracy charge on which she was convicted that this minor transgression did not affect her guilty verdict at all.

Henson's last argument, also advanced by Richard Hagemaster, is that the district court erred in giving the government's multiple conspiracy instruction rather than one she preferred. Henson claimed that she was not involved in Rutledge's cocaine conspiracy, but in different conspiracies for which she was not prosecuted; she preferred a detailed instruction that she believed was necessary to present her defense. Notwithstanding the overwhelming evidence of her participation in Rutledge's cocaine operation, the district court, who admitted doubt of its necessity, gave the government's multiple conspiracy instruction. Again, the district court made the proper decision.

In reviewing the fitness of jury instructions to which objections were properly raised in the proceedings below, "we must determine from looking at the charge as a whole, 'whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues.'" *United States v. Boykins*, 9 F.3d 1278, 1285 (quoting *Trustees of Indiana Univ. v. Aetna Casualty and Sur. Co.*, 920 F.2d 429, 437 (7th Cir. 1990)). A defendant is not entitled to have a particular instruction presented to the jury, but only to have her theory of the defense presented. *United States v. Boucher*, 796 F.2d 972, 976 (7th Cir. 1986). In these matters, the district court is

given substantial discretion with respect to the specific wording of the instruction. *United States v. Penson*, 896 F.2d 1087, 1090 (7th Cir. 1990).

The instruction tendered by the government and given by the district court informed the jury that if it should find that a particular defendant did not join the conspiracy that was charged in the indictment, it must find the defendant not guilty of conspiracy. This is the very instruction of which we approved in similar circumstances in *Penson*, 896 F.2d at 1091. Since we are not sure that a multiple conspiracy instruction is even warranted in this case, we agree with the district court that government's tendered instruction "is all any defendant could legitimately ask for in relation to this type of instruction." Henson and Hagemaster were not prejudiced by the district court's failure to give their preferred multiple conspiracy instruction.

C. Richard Hagemaster

Hagemaster's principal argument is that the district court erred in admitting Michael Wright's in-court identification of Hagemaster. He claims that Wright's identification is unreliable and therefore constitutes a denial of his Fifth Amendment Due Process rights. This argument is without merit.

During the course of the trial, Wright described a particular drug transaction that transpired in 1988 in which he gave money to Henson to deliver to Rutledge in exchange for an ounce of cocaine. Wright testified that he had waited several hours and after calling Rutledge twice

to remind him of his order, Rutledge assured Wright that the courier was on his way. Wright continued:

Forty-five minutes to an hour later, a car pulled up in the driveway, an old VW bug with no fenders on the rear end, and a tall, skinny guy got out wearing a fatigue jacket, pearl earring in his ear. Like I say, a very slender person. Crowe let him in. He introduced me to - I believe his name was - his name was Rick at the time. And we sat there and talked and, anyway, this guy, this Rick or the guy that had brought the dope, he threw it out on the coffee table and he said, "This is what it is."

Wright testified that he was displeased with the quality of the cocaine and that Hagemaster must have realized Wright's displeasure by the expression on his face because Hagemaster informed Wright that if the cocaine was unacceptable, Rutledge would return Wright's money. Wright then identified Hagemaster, in court and seated at the defense table, as the cocaine courier.

On cross-examination, Hagemaster's counsel pressed Wright for more details of the transaction. Wright happily obliged. Wright described Hagemaster's clothing again and testified that Hagemaster sat for thirty minutes in his living room where there were three or four lamps providing light. Wright also testified that he had seen Hagemaster on another occasion at Rutledge's trailer when Wright was there to obtain cocaine.

Wright also testified that he had originally described Hagemaster to investigating agents in 1990. Also, in a subsequent meeting with them, the agents showed Wright a single photograph and asked him whether he

recognized the person in the photograph. The person in the photograph was Richard Hagemaster, although the agents did not so identify him to Wright. It is the presentation of the single photograph of Hagemaster to Wright that Hagemaster claims was so suggestive as to render Wright's in-court identification of Hagemaster unreliable.

The admissibility of a challenged in-court identification is governed by a two-part test. First, we must determine whether the initial out-of-court identification was unduly suggestive; here, the presentation of the single photograph of Hagemaster. If so, the in-court identification is inadmissible unless it is so reliable, in view of the totality of the circumstances, as to prevent a substantial likelihood of misidentification. *Manson v. Brathwaite*, 432 U.S. 98, 107-14 (1977). The district court determined that the presentation of the single photograph of Hagemaster to Wright was unduly suggestive, and we do not disagree. But we also agree with the district court that Wright's in-court identification of Hagemaster was sufficiently reliable that it withstands Hagemaster's due process challenge.

Our inquiry into the reliability of Wright's in-court identification of Hagemaster is guided by several factors: the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time of the crime and the confrontation. *United States v. Larkin*, 978 F.2d 964, 970 (7th Cir. 1992) (citing *Manson*,

432 U.S. at 114). In this case, the totality of the circumstances, within the framework of these factors, demonstrates that Wright's in-court identification was indeed reliable.

Wright testified that he spent thirty minutes with Hagemaster in his well-lighted living room at the time of the crime. This provided Wright with ample opportunity to view Hagemaster. Wright's testimony indicates that he was quite attentive during the commission of the crime. He described Hagemaster's VW bus and his appearance in significant detail. In addition, Wright's belief that Hagemaster could see the displeasure register on Wright's face indicates that the two men were in reasonably close proximity with one another, each capable of noticing the other's features and expressions. And while the lapse of time between the time of the commission of the crime and the trial is not insignificant, Wright's detailed description of Hagemaster and his conviction that the man at the defense table was Hagemaster demonstrate that the identification was reliable. The district court properly admitted Wright's in-court identification of Hagemaster. Hagemaster's other claims are without merit and do not require discussion.

III. Conclusion

For the foregoing reasons, the convictions of Tommy Lee Rutledge, Shelly Henson, and Richard Hagemaster are

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

January 3, 1995.

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. JAMES L. FOREMAN, District Judge*

| | |
|------------------------------|---|
| UNITED STATES OF AMERICA, |) Appeal from the United States District Court for the |
| Plaintiff-Appellee, |) Central District of Illinois, |
| No. 93-1122 v. |) 91 CR 40009 |
| TOMMY L. RUTLEDGE |) Michael M. Mihm, <i>Chief</i> |
| Defendant-Appellant. |) <i>Judge.</i> |

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-captioned case by defendant-appellant, a majority of the judges on the original panel have voted to deny and none of the judges in active service has requested a vote thereon.

Therefore, the petition for rehearing with suggestion for rehearing en banc is DENIED.

* The Honorable James L. Foreman, United States District Judge for the Southern District of Illinois, is sitting by designation.

SUPREME COURT OF THE UNITED STATES

No. 94-8769

Tommy L. Rutledge,
Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 26, 1995

THE END

Supreme Court U.S.
FILED
AUG 25 1995

Supreme Court of the United States
OCTOBER TERM, 1995

TOMMY L. KUTTLEJEGE, *President*

UNITED STATES OF AMERICA,
Department.

**ON THE CREDITORS OF THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment bars the entry of judgments of conviction and the imposition of concurrent sentences on two separate counts in an indictment where the conduct that forms the basis of the count alleging a conspiracy to distribute a controlled substance (21 U.S.C. § 846) is identical to the conduct that establishes the "in concert" element in the count alleging a continuing criminal enterprise (21 U.S.C. § 848).

TABLE OF AUTHORITIES
OPINIONS BELOW

THE SEVENTH CIRCUIT'S PRACTICE OF ALLOWING ENTRY OF JUDGMENTS OF CONVICTION AND CONCURRENT SENTENCES ON CCE AND CONSPIRACY VERDICTS IN CASES INVOLVING A SINGLE DOUBLE UP-CONDUCT VIOLATES THE FIFTH AMENDMENT.

THE SEVENTH CIRCUIT'S PRACTICE OF ALLOWING ENTRY OF JUDGMENTS OF CONVICTION AND CONCURRENT SENTENCES ON CCE AND CONSPIRACY VERDICTS IN CASES INVOLVING A SINGLE DOUBLE UP-CONDUCT VIOLATES THE FIFTH AMENDMENT.

Congress Did Not Intend to Punish Defendants Twice for a Single Course of Conduct Under Both 21 U.S.C. § 845 (Continuing Criminal Enterprise) and 21 U.S.C. § 846 (Conspiracy).

LIST OF PARTIES

Petitioner Tommy L. Rutledge was the only appellant in Case No. 93-1122 in the United States Court of Appeals for the Seventh Circuit. His case was consolidated on appeal with Case No. 93-2652, in which Shelly Henson was the only appellant, and Case No. 93-2653, in which Richard Hagemaster was the only appellant. Petitioner's appeal also was consolidated initially with Case No. 93-2654, in which Stan Winters was the only appellant, but that case subsequently was severed from the consolidated appeals. The United States of America was the only appellee in all of these appeals.

In the United States District Court for the Central District of Illinois, petitioner was named as a co-defendant in a second superseding indictment with Shelly Henson, Richard Hagemaster, Stan Winters, and Donald Taylor in Criminal Case No. 91-40009. In a prior indictment in the same case, petitioner had been named as a co-defendant with Roger Malott. The United States of America was the only plaintiff in that case.

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UNITED STATES OF AMERICA
Appellant

BRIEF FOR PETITIONER

OPINION BELOW

The judgment of the United States Court of Appeals for the Seventh Circuit, in opinion and in denial of the petition for rehearing and suggestion for rehearing en banc, are recited at United States v. Radtke, 40 F.3d 379 (7th Cir. 1994). (A. 25-27 and 4.) The judgment of the United States District Court for the Central District of Illinois is unrecited. (A. 37-38.)

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment on November 10, 1994. (A. 25-27.)

In this brief, references will refer to paragraphs in the brief appends to A., and to the record of the court proceedings in "R."

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

TOMMY L. RUTLEDGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Seventh Circuit, its opinion, and its denial of the petition for rehearing and suggestion for rehearing *en banc* are reported as *United States v. Rutledge*, 40 F.3d 879 (7th Cir. 1994). (J.A. 25-47, 48.¹) The judgment of the United States District Court for the Central District of Illinois is unreported. (J.A. 8-24.)

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment on November 10, 1994. (J.A. 25, 47.)

¹ In this brief, petitioner will refer to materials in the Joint Appendix as "J.A. ____", and to the record of the district court proceedings as "R. ____".

Petitioner's timely petition for rehearing and suggestion for rehearing *en banc* was denied on January 3, 1995. (J.A. 48.) Petitioner's motion for leave to proceed *in forma pauperis* and petition for a writ of certiorari were filed on April 3, 1995. The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari were granted on June 26, 1995. (J.A. 49.) Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions, which are set forth in the Appendix to this brief:

- U.S. Constitution amend. V;
- 21 U.S.C. § 841(a) and (b)(1)(A) (Prohibited acts);
- 21 U.S.C. § 846 (Attempt and conspiracy); and
- 21 U.S.C. § 848 (Continuing criminal enterprise).

STATEMENT OF THE CASE

Petitioner Tommy L. Rutledge ("Rutledge") was named as a defendant in a second superseding indictment (the "indictment") filed on December 4, 1991, in the United States District Court for the Central District of Illinois. (J.A. 2-7.) Count 1 of the indictment alleged that Rutledge "knowingly and intentionally did engage in a continuing criminal enterprise, namely a series of violations of Title 21, United States Code, Sections 841(a)(1) and 846" and that such conduct was "[i]n violation of Title 21, United States Code, Section 848." (J.A. 2-3.) Count 2 of the indictment alleged that Rutledge, along with his co-defendants, had conspired

to possess cocaine with intent to distribute "in violation of Title 21, United States Code, Section 846." (J.A. 3-5.)²

On June 25, 1992, following a nine-day trial, the jury returned a verdict of guilty against Rutledge on both the continuing criminal enterprise ("CCE") count and the conspiracy count, as well as all other counts of the indictment. (R. 153.) On December 29, 1992, the district court entered judgments of conviction on all counts of the indictment. The district court sentenced Rutledge to serve a prison term of life on the conviction under Count 1 of the indictment (CCE, 21 U.S.C. § 848), and a prison term of life on Count 2 of the indictment (conspiracy, 21 U.S.C. § 846). (J.A. 10.) The judgment of the district court specified that the separate life sentences under Count 1 and Count 2 of the indictment would run concurrently. (*Id.*) Pursuant to 18 U.S.C. § 3013, the district court ordered Rutledge to pay a special assessment of \$300, consisting of a separate \$50 assessment for each judgment of conviction. (J.A. 9.)

On appeal, Rutledge argued that the district court violated the Double Jeopardy Clause of the Fifth Amendment both when the court entered separate judgments of conviction on the CCE charged in Count 1 and the conspiracy charged in Count 2, and when it imposed separate, concurrent sentences on those counts. *United States v. Rutledge*, 40 F.3d 879, 886 (7th Cir. 1994). (J.A. 37.³) The United States Court of Appeals for the Seventh Circuit agreed that "the conspiracy charge is a lesser included offense of the CCE

² The indictment also charged Rutledge with possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (Count 3), possession of a firearm after conviction of a felony in violation of 18 U.S.C. § 922(g) (Count 4), and carrying and using a firearm in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c) (Counts 5 and 6). (J.A. 5-7.) No questions are presented with respect to those counts in this Court.

³ Rutledge raised other claims of error with respect to both his trial and his sentencing. (J.A. 30-37.) Those claims are not pursued in this Court.

charge," but rejected Rutledge's Double Jeopardy Clause argument. 40 F.3d at 886. (J.A. 38.) Instead, the court of appeals adhered to the position it has taken since 1986 that "[c]oncurrent sentences may be imposed for conspiracy and CCE provided the cumulative punishment does not exceed the maximum under the CCE Act." 40 F.3d at 886, *citing United States v. Bafia*, 949 F.2d 1465, 1473 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1989 (1992), and *United States v. Bond*, 847 F.2d 1233, 1239 (7th Cir. 1988). (J.A. 38.) The court of appeals affirmed Rutledge's convictions and sentences in their entirety. 40 F.3d at 890. (J.A. 47.)

On December 6, 1994, Rutledge filed a timely pro se petition for rehearing and suggestion for rehearing *en banc* pursuant to an extension of time granted by the Seventh Circuit. In that petition he directed the Seventh Circuit's attention to *Mohwish v. United States*, 113 S. Ct. 1378 (1993).⁴ In *Mohwish*, this Court vacated the Sixth Circuit's affirmance of the petitioner's judgment of conviction and concurrent sentences for both CCE and conspiracy counts, and remanded to the Sixth Circuit "for further consideration in light of the position presently asserted by the Acting Solicitor General." *Id.* at 1378. The Acting Solicitor General had argued that Congress did not intend to permit cumulative punishment for both CCE and conspiracy counts in cases where the evidence supporting the conspiracy conviction is the same as the evidence establishing the "in concert" element of the CCE violation. Brief for United States at 14, *Mohwish v. United States*, 113 S. Ct. 1378 (1993). The court of appeals denied Rutledge's petition for rehearing and suggestion for rehearing *en banc* without explanation on January 3, 1995. (J.A. 48.)

⁴ Rutledge had previously raised *Mohwish* in a *pro se* letter to the Seventh Circuit, filed pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, on October 6, 1994, five weeks before the court of appeals issued its judgment and opinion affirming the district court.

Rutledge filed his petition for a writ of certiorari on April 3, 1995, requesting that this Court require the Seventh Circuit to conform its approach to multiple guilty verdicts under 21 U.S.C. §§ 846 and 848 to the requirements of the Double Jeopardy Clause, and to the practice adopted by a significant majority of the other circuits. The petition for a writ of certiorari was granted on June 26, 1995. (J.A. 49.)

SUMMARY OF ARGUMENT

Application of three of this Court's cases requires that the court below be reversed and one of Rutledge's convictions and sentences be vacated: *Jeffers v. United States*, 432 U.S. 137 (1977); *Garrett v. United States*, 471 U.S. 773 (1985); and *Ball v. United States*, 470 U.S. 856 (1985).

There is no dispute in this case that Rutledge's conspiracy conviction rests on the very same conduct that the Government used to prove the "in concert" element of the CCE offense. Nevertheless, since 1986, the Seventh Circuit has endorsed the entry of separate judgments of conviction and imposition of concurrent sentences when a jury returns guilty verdicts on CCE and conspiracy counts. It is the only circuit to do so; nine others prohibit the entry of judgment and imposition of sentence on both, while two permit judgment but prohibit even concurrent sentences. Hence, the Seventh Circuit alone holds the Double Jeopardy Clause satisfied so long as the total length of the concurrent sentences imposed on the CCE and conspiracy judgments does not exceed the maximum authorized under one of the offenses of conviction.

This approach by the Seventh Circuit to multiple guilty verdicts in the context of combined CCE and conspiracy prosecutions contradicts this Court's Double Jeopardy Clause ruling in *Jeffers v. United States*, 432 U.S. 137 (1977), which this Court reaffirmed in *Garrett v. United States*, 471 U.S. 773 (1985). In *Jeffers*, this Court concluded that Congress did not intend to provide for cumulative punishment under the conspiracy and CCE statutes in

cases in which the same facts form the basis for both the conspiracy count and the concerted action element of the CCE charge. And in *Garrett*, this Court explicitly approved the rationale and holding of *Jeffers*. Congress, although it has otherwise amended both the conspiracy and CCE statutes since this Court decided *Garrett*, has left standing this Court's conclusion that Congress did not intend the two statutes to provide cumulative punishment based on the same underlying conduct.

The Double Jeopardy Clause bars imposition of multiple punishments not authorized by the legislature, either in a single proceeding or in successive proceedings. Because Congress did not intend courts to impose cumulative punishment for CCE and conspiracy convictions based upon the same course of conduct, the Constitution forbids courts from entering judgments of conviction on both guilty verdicts. *A fortiori*, the imposition of concurrent sentences is impermissible. In *Ball v. United States*, 470 U.S. 856 (1985), this Court held that the entry of a judgment of conviction is punishment in and of itself. Accordingly, the *Ball* Court concluded that when Congress did not express an intent to impose cumulative punishment, the Double Jeopardy Clause proscribes the entry of dual judgments of conviction, and consequently the imposition of concurrent sentences for a single course of conduct that violates more than one federal criminal statute.

Therefore, when the jury returned verdicts of guilty against Rutledge on both the CCE and the conspiracy counts, the district court should have entered judgment and imposed a sentence on only one of those verdicts. That is the only approach consistent with this Court's decisions in *Jeffers*, *Garrett*, and *Ball*. That approach also furthers the purpose of the Double Jeopardy Clause by mitigating the dangers of prosecutorial overreaching inherent in the distinctly modern practice of routinely bringing multiple-count indictments based on a single course of conduct — a practice that is itself a byproduct of the relatively recent explosive proliferation of criminal statutes.

Unless Congress clearly expresses its intent to permit cumulative punishment for a single course of conduct, the Double Jeopardy Clause prohibits both the entry of multiple judgments of conviction and the imposition of multiple sentences under different statutes. The *per se* rule that this Court adopted in *Ball* with respect to the Double Jeopardy Clause also vindicates fundamental principles of separation of powers and the criminal defendant's due process interest in not being subject to a greater sanction than that contemplated by the legislature. The Seventh Circuit's judgment affirming the district court's multiple judgments and concurrent sentences accordingly should be reversed, and the case should be remanded for the limited purpose of vacating one of the two judgments and its corresponding sentence.

ARGUMENT

THE SEVENTH CIRCUIT'S PRACTICE OF ALLOWING ENTRY OF JUDGMENTS OF CONVICTION AND CONCURRENT SENTENCES ON CCE AND CONSPIRACY VERDICTS IN CASES INVOLVING A SINGLE COURSE OF CONDUCT VIOLATES THE FIFTH AMENDMENT.

This Court has long recognized that the Double Jeopardy Clause protects the criminal defendant against both multiple prosecutions and multiple punishments. *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1941 n.1 (1994), citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Just last term, the Court reaffirmed that "the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." *Witte v. United States*, 115 S. Ct. 2199, 2204 (1995), quoting *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1874). That protection against multiple punishments has "deep roots in our history and jurisprudence." *United States v. Halper*, 490 U.S. 435, 440 (1989).

In recent years, the Court has emphasized that the Double Jeopardy Clause's prohibition against multiple punishments

specifically prohibits a court from imposing multiple or cumulative punishment for particular conduct when such punishment is not intended by the legislature. See *Whalen v. United States*, 445 U.S. 684, 689 (1980) ("If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty"); *id.* at 697 (Blackmun, J., concurring in the judgment) (only function of Double Jeopardy Clause in multiple punishments context "is to prevent . . . the sentencing court from imposing greater punishments than the Legislative Branch intended"); *id.* at 701 (Rehnquist, J., dissenting) (in imposing multiple punishments in single proceeding, dispositive question is "whether Congress intended to authorize separate punishments for the two crimes"). The Double Jeopardy Clause does not proscribe judicial enforcement in a single proceeding of a legislature's intentional enactment of multiple punishments for separately enumerated offenses. *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983); see also *Whalen*, 445 U.S. at 688. When Congress does not authorize cumulative punishment, however, entry of multiple judgments of conviction and the imposition of multiple concurrent sentences are constitutionally forbidden. *Ball v. United States*, 470 U.S. 856, 864-65 (1985). Thus, the Double Jeopardy Clause bars multiple punishments in two specific circumstances: (1) when multiple punishments are imposed for the same conduct in successive proceedings, regardless of legislative intent; and (2) when the legislature did not intend to impose multiple punishments for the same conduct, regardless of whether those punishments are imposed in single or multiple proceedings.

The present case falls within the second of these categories. Congress did not authorize the multiple punishments imposed on Rutledge. This Court already has determined that Congress did not intend cumulative punishment for violations of the two statutes at issue here, 21 U.S.C. §§ 846 and 848, where, as in this case, the proof of the "in concert" element of the CCE offense is essentially

identical to the proof of the conspiracy. *Jeffers v. United States*, 432 U.S. 137, 155-57 (1977); accord *Garrett v. United States*, 471 U.S. 773, 794 (1985). Therefore, the district court imposed constitutionally proscribed multiple punishments, even though it entered the judgments and imposed the sentences in a single proceeding.

A. Congress Did Not Intend To Impose Cumulative Punishment For A Single Course Of Conduct Under Both 21 U.S.C. § 848 (Continuing Criminal Enterprise) And 21 U.S.C. § 846 (Conspiracy).

In this case, as in all Fifth Amendment challenges to multiple punishments, the threshold question is whether the legislature intended to impose cumulative punishment for a single course of conduct that violates more than one criminal statute. *Garrett v. United States*, 471 U.S. 773, 778 (1985). If Congress has not authorized cumulative punishment for violation of the conspiracy statute (21 U.S.C. § 846) and CCE statute (21 U.S.C. § 848), then the Double Jeopardy Clause bars such punishment. See *Whalen v. United States*, 445 U.S. 684, 688-89 (1980); see also *id.* at 701 (Rehnquist, J., dissenting). A court imposing multiple punishments not authorized by Congress violates both the specific guarantee against double jeopardy and the constitutional principle of separation of powers. *Id.* at 689 (footnote omitted).

This Court has already answered that threshold question with respect to 21 U.S.C. §§ 846 and 848. In *Jeffers v. United States*, 432 U.S. 137, 155-56 (1977), Justice Blackmun, writing for a four-Justice plurality, concluded that Congress did not intend "to allow cumulative punishment for violations of §§ 846 and 848." Upon careful analysis, the plurality concluded that both statutes are directed at the incremental harm associated with concerted activity in the area of narcotics trafficking. 432 U.S. at 157. The concurring opinion of Justice Stevens, joined by the remaining three justices who heard the case, agreed with the plurality that cumulative punishment may not be imposed for violations of §§ 846 and

848. *Id.* at 160. Thus the Court concluded, unanimously, that Congress did not intend to authorize cumulative punishment for conduct that violates both the conspiracy and CCE statutes, and that the Double Jeopardy Clause therefore bars such cumulative punishment.

This Court reaffirmed the *Jeffers* analysis of Congress's intent in *Garrett v. United States*, 471 U.S. 773 (1985). There, this Court expressly approved the plurality opinion in *Jeffers* holding that the Double Jeopardy Clause prohibits imposing cumulative penalties for guilty verdicts on CCE and conspiracy counts. *Garrett*, 471 U.S. at 794 (the *Jeffers* plurality "reasonably concluded that the dangers posed by a conspiracy and a CCE were similar and thus there would be little purpose in cumulating the penalties"). The Court ultimately held that Congress did envision cumulative sentences for conduct that violates both the CCE statute and a substantive drug statute such as 21 U.S.C. § 841(a)(1). *Id.*

The Seventh Circuit apparently misreads *Garrett* as altering the principle articulated in *Jeffers* — rather than reaffirming its holding in the conspiracy context. See *United States v. Bafia*, 949 F.2d 1465, 1472 (7th Cir. 1991), cert. denied, 112 S. Ct. 1989 (1992) (stating that Supreme Court authorized multiple punishments under 21 U.S.C. §§ 846 and 848 when it "affirmed Garrett's sentence which included concurrent sentences for CCE and conspiracy convictions"). *Bafia* is incorrect in this regard. While the defendant in *Garrett* also had been convicted of conspiracy under 21 U.S.C. § 846, 471 U.S. at 776, the petitioner in *Garrett* did not challenge that conviction in this Court. See 52 U.S.L.W. 3912 (June 19, 1984) (questions presented in petition for certiorari in No. 83-1842). Therefore, this Court's opinion dealt exclusively with the interaction of CCE and substantive offenses. Where this Court does not address a particular issue in its opinion, the opinion's silence on that issue may not be taken as approval of the action of the court below with respect to that point. See *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (refusing to consider as

precedent for jurisdiction other opinions in which Court took jurisdiction without discussion); see also *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14 (1976) (summary affirmance not a *stare decisis* barrier to Court now considering the merits).

The basis for the finding in *Jeffers* that Congress did not intend cumulative punishment for CCE and conspiracy violations was that both statutes are aimed at the same "additional dangers posed by concerted activity." *Jeffers*, 432 U.S. at 157. There is, however, no such duplication between the purposes of substantive drug offenses and the proscription of continuing criminal enterprises found in 21 U.S.C. § 848, the CCE statute. As *Garrett* itself makes clear, the distinction between conspiracy and substantive offenses is dispositive in this context. See 471 U.S. at 794.

The Court's interpretation of congressional intent in *Jeffers* and *Garrett* was subsequently confirmed when Congress amended both 21 U.S.C. § 846 and 21 U.S.C. § 848 in the years following *Garrett* but did not enact any amendment to change this Court's ruling that a court cannot impose cumulative punishment under both statutes for a single course of conduct. See, e.g., Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VI, § 6470(a), 102 Stat. 4377 (1988) (amending 21 U.S.C. § 846); *id.*, Title VI, § 6481, Title VII, 7001, 102 Stat. 4382, 4387-88 (1988) (amending 21 U.S.C. § 848); Violent Crime Control Act of 1994, Pub. L. No. 103-322, Title XXXIII, §§ 330003(e), 330009(d), 330014, 108 Stat. 2141, 2143, 2146 (1994) (amending 21 U.S.C. § 848). Congress "is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); see also *Keene Corp. v. United States*, 113 S. Ct. 2035, 2043 (1993) (same). Where, as here, Congress revisits those statutes several times without disturbing this Court's specific, reiterated, and authoritative interpretation of their punitive effect, the presumption in favor of the prior judicial interpretation is all the stronger.

Garrett's analysis of the interaction between CCE and substantive offenses did not affect the Court's conclusion in *Jeffers* that Congress did not intend to impose a cumulative penalty on a defendant convicted of CCE and conspiracy violations in cases involving a single course of conduct. It is, and should remain, the view of this Court that the Double Jeopardy Clause forbids the imposition of cumulative punishment for CCE and conspiracy violations based on the same concerted activity.

B. The Seventh Circuit's Practice Of Allowing Entry Of Judgments of Conviction And Imposition of Concurrent Sentences Upon Guilty Verdicts For Both CCE And Conspiracy Counts Involving Identical Conduct Impermissibly Sanctions Cumulative Punishment Proscribed By The Fifth Amendment.

Given this Court's holding that Congress did not intend to impose cumulative punishment for a single course of conduct under the CCE and conspiracy statutes, the Double Jeopardy Clause bars not only the imposition of concurrent sentences on both counts, but also the entry of judgments of conviction on both verdicts. That conclusion follows from this Court's decision in *Ball v. United States*, 470 U.S. 856 (1985). In *Ball*, this Court held that Congress did not intend to allow cumulative punishment for the same conduct that resulted in separate violations of statutes prohibiting receiving a firearm (18 U.S.C. § 922(h)(1)) and possessing the same firearm (18 U.S.C. § 1202(a)(1)). *Id.* at 865. The Court stressed that punishment prohibited by the Double Jeopardy Clause, see *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), includes "a criminal conviction and not simply the imposition of sentence." *Ball*, 470 U.S. at 861. Moreover, this Court held in *Ball* that "[t]he second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence." *Id.* at 864-65. Accordingly, this Court held without dissent that "the second conviction, even if it results in no greater sentence, is an impermissible punishment." *Id.* at 865 (emphasis supplied).

Under *Ball*, the Double Jeopardy Clause forbids even the entry of a second judgment of conviction in cases where the legislature did not intend cumulative punishment, regardless of whether that second judgment has any tangible effect on the defendant. Because *Ball* held that the unauthorized additional judgment by itself violates the Double Jeopardy Clause, the unconstitutionality of that judgment does not turn upon the existence *vel non* of foreseeable or unforeseeable collateral consequences. The Court in *Ball* did identify potential consequences that might possibly arise following the entry of multiple judgments of conviction in violation of the Double Jeopardy Clause. For example, *Ball* noted that the presence of two convictions on the record might, among other things, result in an increased sentence under some recidivist statute implicated at some later time, or be used to impeach the defendant's credibility in some later proceeding. *Id.* at 865. The Court also observed that the second judgment of conviction "carries the societal stigma accompanying any criminal conviction," an incremental punishment that is always present when a court enters multiple judgments of conviction. *Id.*

The Court in *Ball* did not, however, rely on the existence or magnitude of the second judgment's potential side effects in determining whether the Double Jeopardy Clause has been violated in the first instance. Indeed, the Court already had recognized in *Jeffers* that double jeopardy principles apply regardless of whether they have any measurable effect on the defendant's incarceration. There, the Court still held that cumulative punishment under 21 U.S.C. §§ 846 and 848 violates the Double Jeopardy Clause even though it noted that its holding was "of minor significance in this particular case," 432 U.S. at 157, because the Government could obtain the same prison sentence by charging the defendant with a violation of only Section 848.

Ball allows the Government to obtain multiple count indictments alleging separate offenses for which the legislature did not intend cumulative punishment, and to submit those cumulative counts to

the jury. However, *Ball* establishes a *per se* rule that prohibits the entry of judgment and imposition of sentence on both offenses.

Per se rules like the one in *Ball* are favored because they are predictable and easy to use, and therefore conserve precious judicial resources. This Court has formulated such bright-line rules specifically to protect the constitutional rights of criminal defendants. See, e.g., *Michigan v. Jackson*, 475 U.S. 625 (1986) (*per se* rule that after defendant requests assistance of counsel, any waiver of Sixth Amendment right to counsel is invalid); *Edwards v. Arizona*, 451 U.S. 477 (1981) (in furtherance of Fifth Amendment protections discussed in *Miranda v. State of Arizona*, 384 U.S. 436 (1966), *per se* rule is that questioning of suspect must cease as soon as he or she asks for lawyer).

The merit of a bright-line rule "lies in the clarity of its command and the certainty of its application." *Mirwick v. Mississippi*, 498 U.S. 146, 151 (1990). Such a rule conserves judicial resources that would otherwise be expended in making difficult case-by-case determinations and implements existing constitutional protections in practical and straightforward terms. *Id.* In a variety of settings, this Court has avoided imposing case-by-case analysis requirements where the "clarity and ease of application" of an existing *per se* rule would be lost. See, e.g., *Davis v. United States*, 114 S. Ct. 2350, 2356 (1994) (refusing to create exception to "bright line" *Edwards* requirement that request for counsel be unambiguous before interrogation must cease).

The categorical rule in *Ball* serves the laudable goals of bright-line rules in general. It is unambiguous and easy to administer. Indeed, nine circuits already apply this rule to cumulative punishment under 21 U.S.C. §§ 846 and 848 with no difficulty. See p. 17, *infra*. The *Ball* rule prevents the violation of a defendant's rights under the Double Jeopardy Clause without interfering with the trial of the case in any way, because it only comes into play if and when a jury returns guilty verdicts upon two or more cumulative counts. Indeed, it may well serve to simplify trials by

diminishing the incentive "for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction" that came with "the advent of specificity in [legislative] draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses." *Ashe v. Swenson*, 397 U.S. 436, 446 (1970). Furthermore, the *Ball* rule avoids requiring a district court to rely on prophecy to predict whether any conceivable harm would ever result to a defendant before entering judgments of conviction under both Sections 846 and 848.

On the other hand, without the *Ball per se* rule, trial courts will have to attempt to predict the future before vindicating a criminal defendant's double jeopardy rights. This approach would thwart a fundamental constitutional protection without any corresponding benefit to the administration of justice. To the contrary, at best the case-specific inquiry into tangible consequences would hinder the administration of justice; more likely the inquiry would be unworkable. For example, given the economic limitations on our already overtaxed prison systems, the longer sentences being meted out, and the fact that elderly prisoners are the most costly to incarcerate and often the least likely to recidivate, legislatures may well resort to alternatives to incarceration, like home confinement or even early or compassionate release, for certain older prisoners.⁵ In determining eligibility for such alternatives, an additional judgment of conviction and concurrent sentence that would appear to have no tangible effect at the trial might have a substantial impact twenty or thirty years later. Much more sensible than trying to predict the course of events over the span of a life sentence is the rule already established in *Ball* — that the entry of a cumulative judgment of

⁵ See, e.g., Zimbardo, *Transforming California's Prisons Into Expensive Old Age Homes for Felons: Enormous Hidden Costs and Consequences for California's Taxpayers*, Report from the Center on Juvenile and Criminal Justice (Nov. 1994); Flynn, *The Graying of America's Prison Population*, 72 Prison J. 77 (1992); Turley, *Project for Older Prisoners (POPS)*, George Washington University National Law Center (1991).

conviction is itself a punishment forbidden by the Double Jeopardy Clause.^{6/}

There is little societal cost to using the *Ball per se* rule. By definition, in a case in which the imposition of the cumulative judgment and sentence on the defendant will have absolutely no tangible effect on punishment, the fact that the defendant is not adjudged guilty and sentenced for the cumulative offense will not shorten his or her sentence. In sharp contrast to *Miranda*, for example, which imposes substantial costs on society "by requiring the suppression of trustworthy and highly probative evidence," *Minnick*, 498 U.S. at 151, the *Ball* rule effectuates a fundamental constitutional right efficiently.

When the jury returned verdicts of guilty against Rutledge on both the CCE and the conspiracy counts, the district court entered judgment and imposed a sentence on each of those verdicts, including separate \$50 special assessments pursuant to 18 U.S.C. § 3013. As this Court's decisions in *Jeffers* and *Ball* demonstrate,

^{6/} Furthermore, the concept of "harmless error" is completely inapplicable here. Under a common formulation of this doctrine, "if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict, the error is harmless and the verdict may stand." *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988) (emphasis added), citing *Chapman v. California*, 386 U.S. 18, 24 (1967) ("harmless error" doctrine applies unless constitutional right violated is so basic to a fair trial that any infraction cannot be treated as "harmless error"); see also *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1714 (1993) (on collateral review, error is harmless and habeas relief unwarranted if error did not have "substantial and injurious effect or influence in determining the jury's verdict") (emphasis supplied), citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). This doctrine is concerned exclusively with the fairness of the trial and whether the jury's verdict would have been different had the constitutional error not occurred. See *Rose v. Clark*, 478 U.S. 570, 587 (1986) (Stevens, J., concurring) (violations not related to the truth-seeking function of a trial are not subject to the "harmless error" doctrine). In contrast, the constitutional violation that Rutledge has suffered has no bearing on the jury verdict because the violation did not occur until after the verdicts were returned, when the court entered the judgments and sentences on the multiple convictions.

that violated the Double Jeopardy Clause. Avoiding that violation, though, could not have been more simple. Had the court merely entered judgment and imposed sentence on one of the two counts, the constitutional violation would not have occurred.

In fact, the straightforward application of *Ball* in the context of combined CCE and conspiracy prosecutions already is in effect throughout most of the nation. Nine courts of appeals have held that *Ball*, when considered in conjunction with *Jeffers* and *Garrett*, forbids the imposition of multiple judgments and concurrent sentences for both CCE and conspiracy violations in cases involving the same underlying conduct. See, e.g., *United States v. Rivera-Martinez*, 931 F.2d 148, 153 (1st Cir.), cert. denied, 502 U.S. 862 (1991); *United States v. Butler*, 885 F.2d 195, 202 (4th Cir. 1989); *United States v. Neal*, 27 F.3d 1035, 1054 (5th Cir. 1994), cert. denied, 115 S. Ct. 1165 (1995); *United States v. Paulino*, 935 F.2d 739, 751 (6th Cir. 1991), cert. denied, 502 U.S. 1036 (1992); *United States v. Possick*, 849 F.2d 332, 341 (8th Cir. 1988); *United States v. Hernandez-Escarzega*, 886 F.2d 1560, 1582 (9th Cir. 1989), cert. denied, 497 U.S. 1003 (1990); *United States v. Stallings*, 810 F.2d 973, 976 (10th Cir. 1990); *United States v. Cruz*, 805 F.2d 1464, 1479 (11th Cir. 1986), cert. denied, 481 U.S. 1006 (1987); *United States v. Anderson*, 39 F.3d 331, 357 (D.C. Cir. 1994), reversed on other grounds, 59 F.3d 1323 (D.C. Cir. 1995) (*en banc*).^{7/} Even before this Court's opinion in *Ball*, a number of courts of appeals had ruled that the Double Jeopardy Clause bars both entry of judgment and imposition of concurrent

^{7/} On February 9, 1995, the District of Columbia Circuit granted a suggestion for rehearing *en banc* and vacated the panel opinion in *Anderson*. 39 F.3d at 361. The *en banc* rehearing addressed an unrelated question, holding that a defendant may not be convicted of multiple violations of 18 U.S.C. § 924(c)(1), which provides additional penalties for those who use firearms when committing drug trafficking offenses or crimes of violence, when the Government proves that the defendant used several firearms in connection with a single crime of violence or drug trafficking offense. See 59 F.3d 1323 (D.C. Cir. 1995) (*en banc*).

sentences on separate CCE and conspiracy counts. See, e.g., *United States v. Webster*, 639 F.2d 174, 182 (4th Cir. 1981), modified in part on other grounds, 669 F.2d 186 (4th Cir.), cert. denied, 456 U.S. 935 (1982); *United States v. Michel*, 588 F.2d 986, 1001 (5th Cir.), cert. denied, 444 U.S. 825 (1979); *United States v. Dickey*, 736 F.2d 571, 597 (10th Cir. 1984), cert. denied, 469 U.S. 1188 (1985); *United States v. Graziano*, 710 F.2d 691, 699 (11th Cir. 1983), cert. denied, 466 U.S. 937 (1984); *United States v. Smith*, 703 F.2d 627, 628 (D.C. Cir. 1983). Indeed, the Seventh Circuit is the only court of appeals that allows the imposition of concurrent sentences notwithstanding the clear holdings of *Jeffers*, *Garrett*, and *Ball*.⁸

The Seventh Circuit has refused to draw the line at the jury's return of a guilty verdict, as *Ball* mandated. In *United States v. Bond*, 847 F.2d 1233, 1239 (7th Cir. 1988), the court sought to distinguish *Ball* on the ground that *Ball* only prohibits convictions for violations of separate statutes which "create identical offenses." That distinction cannot be sustained, however, in light of *Ball*'s express focus on the question of legislative intent. Under *Ball*, once a court finds that Congress did not intend a defendant's conduct to be punishable under two separate statutes, "[o]ne of the convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense." *Ball*, 470 U.S. at 864.

This Court's holding in *Jeffers* that Congress did not intend a defendant's single course of conduct to be punishable both as a conspiracy under Section 846 and as a CCE violation under Section

848 should end the double jeopardy inquiry. This conclusion as to Congress's intent automatically implicates the *Ball* prohibition against multiple convictions, not just multiple sentences, and "the only remedy consistent with the congressional intent is for the District Court . . . to vacate one of the underlying convictions." *Ball*, 470 U.S. at 864. The Court's emphasis in *Ball* on the impropriety of even a concurrent sentence under the Double Jeopardy Clause further demonstrates that when a criminal defendant's rights under the Double Jeopardy Clause are implicated, those rights must be protected regardless of the practical effect on the anticipated length of the defendant's incarceration or any other collateral consequences.

⁸ The Second Circuit and the Third Circuit permit the entry of judgment on CCE and conspiracy counts, but neither of those courts permit the imposition of concurrent sentences. See *United States v. Aiello*, 771 F.2d 621, 634 (2d Cir. 1985) (permitting "combined" judgment of conviction on both CCE and conspiracy counts, and imposition of single sentence); *United States v. Fernandez*, 916 F.2d 125, 128-29 (3d Cir. 1990) (permitting separate CCE and conspiracy judgments, but imposition of only one sentence), cert. denied, 500 U.S. 948 (1991).

CONCLUSION

For the foregoing reasons, Petitioner Tommy L. Rutledge respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit and remand with a direction to vacate Rutledge's judgment of conviction and sentence under either Count 1 or Count 2 of the indictment.

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APPENDIX**RELEVANT CONSTITUTIONAL AND
STATUTORY PROVISIONS****United States Constitution****Article V**

The power shall be vested in the Congress to propose amendments which, when ratified by three-fourths of the several states, shall be valid to all intents and purposes as part of this Constitution; and that whenever the Congress shall deem it necessary, it shall propose by bill or joint resolution, or in either Senate or House, an amendment to this Constitution;

United States Code**APPENDIX****§ 511. Proposed amendment****(a) Short title**

1. Being so demanded by the petitioner, it shall be referred to any person having any or any title;

2. Any person having, according to his opinion, no power to demand an amendment, notwithstanding, as demands a reasonable estimation of;

3. Any article, document, or decree, or decree with respect to the exercise of powers, a conflict or otherwise;

¹ The issues are left in the appendices in their natural sequence to show the principal incidents of procedure, and the time for filing of the documents will be, in due interpreting, sufficient of themselves and need not necessarily affect the date for purposes of this appeal.

APPENDIX

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution:

Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code, Title 21:²⁷

§ 841. Prohibited Acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

²⁷ The statutes set forth in this Appendix reflect all amendments to date. The particular substance of amendments enacted after the time of the incidents set forth in the superseding indictment of Rutledge did not materially affect the statutes for purposes of this appeal.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a violation of subsection (a) of this section involving

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$8,000,000 if the defendant is an individual or \$20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title

after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub.L. 95-633, Title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194; Pub.L. 98-473, Title II, §§ 224(a), 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2030, 2068, 2070; Pub.L. 99-570, Title I, § 1005(a), Oct. 27, 1986, 100 Stat. 3207-6; Pub.L. 99-570, Title I, §§ 1002, 1003(a), 1004(a), 1103, Title XV, § 15005, Oct. 27, 1986, 100 Stat. 3207-2, 3207-5, 3207-6, 3207-11, 3207-192; Pub.L. 100-690, Title VI, §§ 6055, 6254(h), 6452(a), 6470(g), (h), 6479, Nov. 18, 1988, 102 Stat. 4318, 4367, 4371, 4378, 4382; Pub.L. 101-647, Title X, § 1002(e), Title XII, § 1202, Title XXXV, § 3599K, Nov. 29, 1990, 104 Stat. 4828, 4830, 4932; Pub.L. 103-322, Title IX, § 90105(a), (c), Title XVIII, § 180201(b)(2)(A), Sept. 13, 1994, 108 Stat. 1987, 1988, 2047.)

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Pub.L. 91-513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265; amended Pub.L. 100-690, Title VI, § 6470(a), Nov. 18, 1988, 102 Stat. 4377.)

§ 848. Continuing criminal enterprise

(a) Penalties: forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this chapter; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18, or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this chapter.

(b) Life imprisonment for engaging in continuing criminal enterprise

Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a) of this section if—

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2) (A) the violation referred to in subsection (c)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received \$10 million

dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

(c) "Continuing criminal enterprise" defined

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(d) Suspension of sentence and probation prohibited

In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C. Code, secs. 24-203 to 24-207), shall not apply.

(e) Death penalty

(1) In addition to the other penalties set forth in this section—

(A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) or section 960(b)(1) who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years,

and which may be up to life imprisonment, or may be sentenced to death; and

(B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter II of this chapter who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer's official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

(2) As used in paragraph (1)(b), the term "law enforcement officer" means a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense, and includes those engaged in corrections, probation, or parole functions.

(g)⁷ Hearing required with respect to the death penalty

A person shall be subjected to the penalty of death for any offense under this section only if a hearing is held in accordance with this section.

(h) Notice by the Government in death penalty cases

(1) Whenever the Government intends to seek the death penalty for an offense under this section for which one of the sentences provided is death, the attorney for the Government, a reasonable time before trial or acceptance by the court of a plea of guilty, shall sign and file with the court, and serve upon the defendant, a notice—

⁷ The official statutory compilation skips subsection (f) of 21 U.S.C. § 48.

(A) that the Government in the event of conviction will seek the sentence of death; and

(B) setting forth the aggravating factors enumerated in subsection (n) of this section and any other aggravating factors which the Government will seek to prove as the basis for the death penalty.

(2) The court may permit the attorney for the Government to amend this notice for good cause shown.

(i) Hearing before court or jury

(1) When the attorney for the Government has filed a notice as required under subsection (h) of this section and the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge if the judge who presided at the trial or before whom the guilty plea was entered is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted—

(A) before the jury which determined the defendant's guilt;

(B) before a jury impaneled for the purpose of the hearing if—

(i) the defendant was convicted upon a plea of guilty;

(ii) the defendant was convicted after a trial before the court sitting without a jury;

(iii) the jury which determined the defendant's guilt has been discharged for good cause; or

(iv) after initial imposition of a sentence under this section, redetermination of the sentence under this section is necessary; or

(C) before the court alone, upon the motion of the defendant and with the approval of the Government.

(2) A jury impaneled under paragraph (1)(B) shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate with the approval of the court that it shall consist of any number less than 12.

(j) Proof of aggravating and mitigating factors

Notwithstanding rule 32(c) of the Federal Rules of Criminal Procedure, when a defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, no presentence report shall be prepared. In the sentencing hearing, information may be presented as to matters relating to any of the aggravating or mitigating factors set forth in subsections (m) and (n) of this section, or any other mitigating factor or any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Where information is presented relating to any of the aggravating factors set forth in subsection (n) of this section, information may be presented relating to any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion. Any other information relevant to such mitigating or aggravating factors may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The Government and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the aggravating or mitigating factors and as to appropriateness in that case of imposing a sentence of death. The Government shall open the argument. The defendant

shall be permitted to reply. The Government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the Government, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless established by a preponderance of the evidence.

(k) Return of findings

The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factors set forth in subsection (n) of this section, found to exist. If one of the aggravating factors set forth in subsection (n)(1) of this section and another of the aggravating factors set forth in paragraphs (2) through (12) of subsection (n) of this section is found to exist, a special finding identifying any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section, may be returned. A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of this subsection, regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If an aggravating factor set forth in subsection (n)(1) of this section is not found to exist or an aggravating factor set forth in subsection (n)(1) of this section is found to exist but no other aggravating factor set forth in subsection (n) of this section is found to exist, the court shall impose a sentence, other than death, authorized by law. If an aggravating factor set forth in subsection (n)(1) of this section and one or more of the other aggravating factors set forth in subsection (n) of this section are found to exist, the jury, or if there is no jury, the court, shall then consider whether the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of

mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without possibility of release or some other lesser sentence. The jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed.

(l) Imposition of sentence

Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence, other than death, authorized by law. A sentence of death shall not be carried out upon a person who is under 18 years of age at the time the crime was committed. A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability—

(1) cannot understand the nature of the pending proceedings, what such person was tried for, the reason for the punishment, or the nature of the punishment; or

(2) lacks the capacity to recognize or understand facts which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

(m) Mitigating factors

In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider mitigating factors, including the following:

(1) The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether

the capacity was so impaired as to constitute a defense to the charge.

(2) The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

(3) The defendant is punishable as a principal (as defined in section 2 of Title 18) in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

(4) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of murder, or other offense resulting in death for which the defendant was convicted, would cause, or would create a grave risk of causing, death to any person.

(5) The defendant was youthful, although not under the age of 18.

(6) The defendant did not have a significant prior criminal record.

(7) The defendant committed the offense under severe mental or emotional disturbance.

(8) Another defendant or defendants, equally culpable in the crime, will not be punished by death.

(9) The victim consented to the criminal conduct that resulted in the victim's death.

(10) That other factors in the defendant's background or character mitigate against imposition of the death sentence.

(n) Aggravating factors for homicide

If the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the following aggravating factors are the only aggravating factors that shall be considered,

unless notice of additional aggravating factors is provided under subsection (h)(1)(B) of this section:

(1) The defendant—

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury which resulted in the death of the victim;

(C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim;

(D) intentionally engaged in conduct which—

(i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and

(ii) resulted in the death of the victim.

(2) The defendant has been convicted of another Federal offense, or a State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute.

(3) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury upon another person.

(4) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.

(5) In the commission of the offense or in escaping apprehension for a violation of subsection (e) of this section, the defendant knowingly created a grave risk of death to one or more persons in addition to the victims of the offense.

(6) The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

(7) The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

(8) The defendant committed the offense after substantial planning and premeditation.

(9) The victim was particularly vulnerable due to old age, youth, or infirmity.

(10) The defendant had previously been convicted of violating this subchapter or subchapter II of this chapter for which a sentence of five or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.

(11) The violation of this title in relation to which the conduct described in subsection (e) of this section occurred was a violation of section 859 of this title.

(12) The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

(o) Right of the defendant to justice without discrimination

(1) In any hearing held before a jury under this section, the court shall instruct the jury that in its consideration of whether the sentence of death is justified it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or the victim, and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be. The jury shall return to the court a certificate signed by each juror that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or the victim was not involved in reaching his or her

individual decision, and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be.

(2) Not later than one year from November 18, 1988, the Comptroller General shall conduct a study of the various procedures used by the several States for determining whether or not to impose the death penalty in particular cases, and shall report to the Congress on whether or not any or all of the various procedures create a significant risk that the race of a defendant, or the race of a victim against whom a crime was committed, influence the likelihood that defendants in those States will be sentenced to death. In conducting the study required by this paragraph, the General Accounting Office shall—

(A) use ordinary methods of statistical analysis, including methods comparable to those ruled admissible by the courts in race discrimination cases under title VII of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e et seq.];

(B) study only crimes occurring after January 1, 1976; and

(C) determine what, if any, other factors, including any relation between any aggravating or mitigating factors and the race of the victim or the defendant, may account for any evidence that the race of the defendant, or the race of the victim, influences the likelihood that defendants will be sentenced to death. In addition, the General Accounting Office shall examine separately and include in the report,

death penalty cases involving crimes similar to those covered under this section.

(p) Sentencing in capital cases in which death penalty is not sought or imposed

If a person is convicted for an offense under subsection (e) of this section and the court does not impose the penalty of death, the court may impose a sentence of life imprisonment without the possibility of parole.

(q) Appeal in capital cases; counsel for financially unable defendants

(1) In any case in which the sentence of death is imposed under this section, the sentence of death shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time prescribed for appeal of judgment in section 2107 of Title 28. An appeal under this section may be consolidated with an appeal of the judgment of conviction. Such review shall have priority over all other cases.

(2) On review of the sentence, the court of appeals shall consider the record, the evidence submitted during the trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under this section.

(3) The court shall affirm the sentence if it determines that—

(A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(B) the information supports the special finding of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors as set forth or allowed in this section.

In all other cases the court shall remand the case for reconsideration under this section. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence.

(4) (A) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—

(i) before judgment; or

(ii) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(B) In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(5) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(6) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had

not less than three years experience in the handling of appeals in that court in felony cases.

(7) With respect to paragraphs (5) and (6), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(8) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(9) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10). Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc.

(10) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed under this subsection and the fees and

expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of paragraphs (4) through (9).

(r) Refusal to participate by State and Federal correctional employees

No employee of any State department of corrections or the Federal Bureau of Prisons and no employee providing services to that department or bureau under contract shall be required, as a condition of that employment, or contractual obligation to be in attendance at or to participate in any execution carried out under this section if such participation is contrary to the moral or religious convictions of the employee. For purposes of this subsection, the term "participation in executions" includes personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities.

(Pub.L. 91-513, Title II, § 408, Oct. 27, 1970, 84 Stat. 1265; Pub.L. 98-473, Title II, §§ 224(b), 305, Oct. 12, 1984, 98 Stat. 2030, 2050; Pub.L. 98-473, § 224(b), formerly § 224(c), as amended Pub.L. 99-570, Title I, § 1005(b)(2), Oct. 27, 1987, 100 Stat. 3207-6; Pub.L. 99-570, Title I, §§ 1252, 1253, Oct. 27, 1986, 100 Stat. 3207-14, 3207-15; Pub.L. 100-690, Titles VI, VII, §§ 6481, 7001, Nov. 18, 1988, 102 Stat. 4382, 4387, 4388; Pub.L. 103-322, Title XXXIII, §§ 330003(e), 330009(d), 330014, Sept. 13, 1994, 108 Stat. 2141, 2143, 2146.)

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether petitioner's conviction and concurrent sentence for drug conspiracy, in violation of 21 U.S.C. 846, must be vacated in light of his conviction and sentence for operating a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848, where the "in concert with" element of the CCE violation was based on the same agreement as the Section 846 conspiracy.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-8769

TOMMY L. RUTLEDGE, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 25-47) is reported at 40 F.3d 879.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1994. A petition for rehearing was denied on January 3, 1995. J.A. 48. The petition for a writ of certiorari was filed on April 3, 1995, and was granted on June 26, 1995. J.A. 49. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

(1)

STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions, which are set forth in an appendix to this brief: 21 U.S.C. 846 (drug conspiracy); 21 U.S.C. 848(a)-(e) (continuing criminal enterprise).

STATEMENT

After a jury trial in the United States District Court for the Central District of Illinois, petitioner was convicted of operating a continuing criminal enterprise (CCE) (Count 1), in violation of 21 U.S.C. 848; conspiring to distribute cocaine (Count 2), in violation of 21 U.S.C. 846; distributing cocaine (Count 3), in violation of 21 U.S.C. 841(a)(1); possessing a firearm after being convicted of a felony (Count 4), in violation of 18 U.S.C. 922(g); and using or carrying a firearm during and in relation to a drug trafficking offense (Counts 5, 6), in violation of 18 U.S.C. 924(c). J.A. 8-9. He was sentenced to concurrent terms of life imprisonment without possible release for the CCE, drug conspiracy, and distribution of cocaine offenses, and other terms of imprisonment for the other offenses. He was not fined, but he was ordered to pay a special assessment on each Count of \$50 under 18 U.S.C. 3013. J.A. 9-10. The court of appeals affirmed. J.A. 25-47.

1. Petitioner was the leader of a large drug organization that distributed multi-kilogram quantities of cocaine from 1988 to 1990. He bought cocaine from the Latin Kings street gang in Chicago and distributed it in Warren County, in northern Illinois. Petitioner kept firearms for protection, and he also traded firearms for cocaine. J.A. 26-28.

2. The second superseding indictment charged petitioner with the six offenses recited above. J.A. 2-7. In order to convict petitioner on the CCE charged in Count 1, the jury had to find that petitioner committed a felony drug offense in violation of Subchapter I or II of Chapter 13 of Title 21, as part of a continuing series of such violations, which were undertaken "in concert with" five or more other persons of whom the defendant was an organizer, supervisor, or manager, and from which he obtained substantial income or resources. 21 U.S.C. 848(c); J.A. 2-3. In order to convict petitioner of the drug conspiracy charged in Count 2, the jury was required to find that petitioner conspired to possess cocaine with intent to distribute it and that he distributed cocaine. The Count 2 drug conspiracy charge was based on the same criminal agreement that formed the basis of the "in concert with" element of the Count 1 CCE charge; it involved the same persons, the same time periods, and the same overt acts. J.A. 2-5.

All counts were submitted to the jury and the jury returned guilty verdicts on all of them. J.A. 8.

3. The district court sentenced petitioner to concurrent terms of life imprisonment without possible release for the Count 1 CCE offense, the Count 2 drug conspiracy offense, and the Count 3 substantive cocaine-distribution offense. J.A. 10. The court also imposed ten years' imprisonment for the Count 4 offense of possession of a firearm as a convicted felon, to run concurrently with the three life sentences; five years' imprisonment for the Count 5 offense of using or carrying a firearm during and in relation to a drug trafficking offense, to run con-

secutively to all other sentences, and ten years' imprisonment for the like offense under Count 6, to run consecutively to all other sentences. *Ibid.* The court imposed the \$50 special assessment under 18 U.S.C. 3013 on each count, for a total of \$300. J.A. 9.

4. The court of appeals affirmed. J.A. 25-47. Petitioner claimed that his conviction and sentence on both the CCE and the drug conspiracy charge violated the Double Jeopardy Clause, because it amounted to punishing him twice for the same offense. The court of appeals rejected that claim, reasoning that, "[w]hile the conspiracy charge is a lesser included offense of the CCE charge, double jeopardy is not implicated as long as [the] district court does not impose cumulative sentences for the crimes." J.A. 37-38. The court held that, "by imposing concurrent sentences, the district court did not impose a cumulative penalty, and [petitioner's] sentence is proper." J.A. 38.

SUMMARY OF ARGUMENT

It is well settled that a defendant may be indicted, tried, and found guilty by a jury in a single proceeding of both violating the CCE statute and committing a drug conspiracy in violation of 21 U.S.C. 846, where the same agreement is involved in both offenses. The question in this case is whether a court may enter dual convictions and concurrent sentences based on a jury verdict that finds the defendant guilty of both the CCE and the conspiracy charge. As with other questions about whether multiple punishments may be imposed in a single proceeding for the same offense, the answer to that question turns on congressional intent. In our view, the structure, legislative history, and purposes underlying the CCE and drug conspiracy statutes indicate that Congress intended that

a defendant convicted of both be subject to dual convictions and concurrent sentences.

While the conduct prohibited by the CCE and drug conspiracy statutes is related, the two provisions differ substantially. The elements of each offense and the punishments for each offense are defined in distinct statutes that do not refer to each other. Moreover, the CCE offense is a hybrid conspiracy/substantive offense that is fundamentally different from the "pure" Section 846 drug conspiracy offense. As a result, many "simple" drug conspiracy cases will not involve commission of a CCE offense by anyone, and in others at least some of the defendants who conspired to distribute drugs would not have violated the CCE statute. Accordingly, it is reasonable to infer that Congress intended that separate convictions be entered when a defendant violates both the drug conspiracy and CCE statutes, even though Congress may not have intended that the total sentence exceed what would be imposed for the more serious of the two offenses (normally, the CCE).

An additional important reason for inferring that Congress intended to permit entry of dual convictions and concurrent sentences is that this procedure is the simplest and most rational way to ensure that, if a defendant's CCE conviction is ultimately overturned on appeal or collateral attack, he would still be punished for his commission of a Section 846 drug conspiracy. Congress would not have wanted to permit such a defendant to escape punishment, or to require complicated procedures for its imposition. And there is no reason to think that Congress would have wished to protect a defendant from the possible adverse consequences flowing from the entry of the

second conviction, because a defendant convicted of a CCE offense is not likely to experience collateral consequences from the entry of a drug conspiracy conviction when that conviction carries a concurrent sentence with the CCE.

If the Court holds that Congress did not intend to permit dual convictions and concurrent sentences, the Court must determine the procedure a district court should follow when a jury returns verdicts of guilty on CCE and drug conspiracy charges based on the same agreement. In our view, the most efficient and workable approach is that adopted by the Second Circuit, under which the two verdicts of guilty on the CCE and Section 846 drug conspiracy counts merge into a single judgment of conviction, with a single sentence that can be no greater than the sentence that would have been imposed for the more serious of the two offenses. Under that approach, the defendant suffers no conceivable adverse consequences. The government, however, is ensured that, if the CCE conviction (but not the drug conspiracy conviction) is ever reversed, a court can still punish the defendant for the Section 846 drug conspiracy of which the jury found him guilty.

ARGUMENT

I. PETITIONER'S JUDGMENTS OF CONVICTION AND CONCURRENT LIFE SENTENCES FOR THE CCE AND DRUG CONSPIRACY OFFENSES SHOULD BE AFFIRMED

Petitioner was convicted of a Section 846 drug conspiracy and of violating the CCE statute. Both the Section 846 drug conspiracy and the "in concert with" element of the CCE offense were satisfied by proof of the same agreement. The Seventh Circuit

held that, in those circumstances, the district court properly entered a separate conviction for each of the two offenses and imposed concurrent prison sentences for the two offenses. Petitioner was not subjected to a longer term of imprisonment than he would have received for the CCE offense alone and, since no fine was imposed, he was not subjected to a greater fine than he would have received for the CCE offense alone. In our view, that disposition accords with congressional intent regarding dual punishment for CCE and a Section 846 drug conspiracy based on the same agreement. The judgment of the Seventh Circuit should therefore be affirmed.¹

¹ We note that the judgments on the CCE and the drug conspiracy counts were not concurrent in one respect: a special assessment of \$50 under 18 U.S.C. 3013 was imposed on petitioner for each of those counts. J.A. 9; see *Ray v. United States*, 481 U.S. 736, 737 (1987) (per curiam). Petitioner, however, did not challenge the imposition of those two special assessments either in the court of appeals or in this Court, and the question presented by the petition presupposes that the two sentences are fully concurrent. See Pet. i; Pet. Br. i. Therefore, it is not necessary to decide in this case whether it is permissible to impose a special assessment as well as a separate judgment of conviction on both the CCE and drug conspiracy offenses. If it were necessary to reach that question, however, the result would in our view turn on whether CCE and a Section 846 drug conspiracy are in fact the "same offense" and therefore subject to only a single assessment under 18 U.S.C. 3013. For the reasons given in note 5, *infra*, we believe that they are not, strictly speaking, the "same offense," and that separate \$50 special assessments on each count are therefore appropriate.

A. The Double Jeopardy Clause Permits Multiple Punishment For The CCE And Drug Conspiracy Offenses If That Is The Intention Of Congress

The Double Jeopardy Clause provides: “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V. The only aspect of the protection afforded by that Clause at issue in this case is the protection against multiple punishments for the same offense. See *Missouri v. Hunter*, 459 U.S. 359, 365-366 (1983). The Court has made clear that, in a single proceeding, the government may prosecute a defendant for multiple offenses that are constitutionally the “same offense” without violating the Double Jeopardy Clause. *Ohio v. Johnson*, 467 U.S. 493, 500 (1984); see also *Ball v. United States*, 470 U.S. 856, 865 (1985). And when the defendant is convicted in a single proceeding of two offenses that are constitutionally the same, “the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Garrett v. United States*, 471 U.S. 773, 793 (1985), quoting *Missouri v. Hunter*, 459 U.S. at 366; see *Albernaz v. United States*, 450 U.S. 333, 344 (1981) (“[T]he question of what punishments are constitutionally permissible [in a single proceeding] is not different from the question of what punishments the Legislative Branch intended to be imposed.”).

Normally, the Court determines whether two offenses are the “same” for double jeopardy purposes by determining whether each requires proof of an element that the other does not. See *Blockburger v. United States*, 284 U.S. 299 (1932). The CCE offense and the drug conspiracy offense are related to each

other, if at all, through one element. Among the elements of a CCE violation is proof of “a continuing series of violations of [Subchapters I or II of Chapter 13 of Title 21] * * * which are undertaken by [the defendant] *in concert with* five or more other persons.” 21 U.S.C. 848(c)(2) (emphasis added). A Section 846 drug conspiracy violation is established by proof that the defendant “conspire[d] to commit any offense defined in [Subchapter I of Chapter 13 of Title 21].” If proof of the “*in concert with*” element of the CCE violation requires proof that the defendant “conspire[d]” to commit a Subchapter I drug offense, then a drug conspiracy in violation of Section 846 may be viewed as a lesser included offense of the CCE offense.

In *Jeffers v. United States*, 432 U.S. 137 (1977), the Court considered, but did not resolve, the question whether a drug conspiracy is a lesser included offense of a CCE when the two charges rest on the same agreement. Four Justices, in a plurality opinion written by Justice Blackmun, assumed without deciding that drug conspiracy may be a lesser included offense of the CCE offense. *Id.* at 150 & n.16.² Four

² Justice Blackmun’s opinion merely “assume[d]” and did not actually decide that the CCE and drug conspiracy offenses were the “same offense” in this context. See 432 U.S. at 149-150 & n.16 (opinion of Blackmun, J.); *id.* at 155 (“We have concluded that [Congress did not intend to allow cumulative punishment for violations of §§ 846 and 848], and this again makes it unnecessary to reach the lesser-included-offense issue.”). For purposes of rejecting Jeffers’ claim that he could not be prosecuted sequentially for the two offenses, it was necessary only to assume, not decide, the same-offense question: The plurality concluded that he could be prosecuted sequentially under the facts of the case whether or not the two

other Justices, in an opinion by Justice Stevens, apparently would have accepted that proposition without qualification. *Id.* at 158-159 (opinion of Stevens, J., dissenting in part and concurring in the judgment in part). Justice White, writing for himself, took the view that CCE and drug conspiracy offenses were never the same offense. *Id.* at 158 (White, J., concurring in the judgment in part and dissenting in part).³

In our view, this case may be resolved on the same assumption made by the plurality in *Jeffers*, i.e., that a Section 846 drug conspiracy may be regarded as a lesser included offense of CCE, when as a factual matter both offenses involved the establishment of the same criminal agreement.⁴ If the assumption made by

offenses were the "same offense." Likewise, it was necessary only to assume, not decide, that the two offenses were the "same offense" for purposes of deciding the double-punishment issue: If, as the plurality concluded, Congress did not intend cumulative sentences when the CCE and drug conspiracy offenses were based on identical criminal agreements, then a court had no statutory authority to impose cumulative sentences regardless of whether the two crimes were the "same offense" under the Double Jeopardy Clause.

³ Justice White relied on the rationale of *Iannelli v. United States*, 420 U.S. 770 (1975), and therefore concluded that the CCE and drug conspiracy offenses could support separate prosecutions, as well as separate punishments. 432 U.S. at 158.

⁴ Even if that assumption is correct, a particular charged Section 846 conspiracy would not necessarily be a lesser included offense of a particular charged CCE offense. Such a relationship would exist only if proof of the greater offense on the facts of the particular case necessarily proves all elements of the lesser offense. For example, although assault is generally a lesser included offense of murder, a defendant who assaults one individual and then murders another has

the *Jeffers* plurality is correct, then the issue in this case is whether, and to what extent, Congress intended separate punishments for a CCE offense and a lesser included drug conspiracy. But even if that assumption is not correct, the same analysis would determine the outcome in this case, because a federal court in any event has only the sentencing authority granted by Congress and is limited to imposing the punishment authorized by Congress. See, e.g., *Gore v. United States*, 357 U.S. 386 (1958); *Bell v. United States*, 349 U.S. 81 (1955). Accordingly, we proceed on the basis of the *Jeffers* assumption.⁵

committed two entirely distinct offenses. Similarly, even if a Section 846 drug conspiracy is a lesser included offense of a CCE, the two would be entirely distinct if the agreement on which the Section 846 conspiracy is based is distinct from the agreement on which the "in concert with" element of the CCE is based. The courts of appeals have long employed a multi-factor, totality-of-the-circumstances test to determine whether two charged agreements that form the basis for two conspiracy or CCE charges are in fact the same. See, e.g., *United States v. McHan*, 966 F.2d 134, 137-138 (4th Cir. 1992); *United States v. Langella*, 804 F.2d 185, 189 (2d Cir. 1986); *United States v. Ruggiero*, 754 F.2d 927, 932 (11th Cir.), cert. denied, 471 U.S. 1127, 1137 (1985); *United States v. Marable*, 578 F.2d 151, 154 (5th Cir. 1978); cf. *United States v. Broce*, 488 U.S. 563, 585 n.2 (1989) (Blackmun, J., dissenting). The application of that test is not at issue in this case, because all parties to this case agree, as in *Jeffers*, that the Section 846 drug conspiracy with which petitioner was charged is based on the same agreement as the "in concert with" element of the CCE.

⁵ The government contended in *Jeffers* that drug conspiracy is not a lesser included offense of the CCE offense, because the "in concert with" element does not require proof of a conspiracy. See U.S. Br. in *Jeffers* at 23, No. 75-1805. Our argument was that a CCE defendant may be found to have acted "in concert with" others so long as the defendant acted

B. Congress Intended To Permit Separate, Concurrent Punishments For A Section 846 Drug Conspiracy And CCE Offense Based On The Same Agreement

1. The Seventh Circuit's approach to the issue in this case—permitting two convictions and concurrent sentences—mirrors the result in *Jeffers*.⁶ In *Jeffers*, the defendant—like petitioner—was convicted of a Section 846 drug conspiracy and CCE. He was sentenced to the maximum applicable punishment of 15 years' imprisonment and a \$25,000 fine for the Section 846 drug conspiracy, see 432 U.S. at 143

with criminal intent, even if the other participants in the enterprise were unaware of the true criminal character of the enterprise and thus were not conspirators with him. Although we adhere to that position, the courts of appeals have not generally accepted it in recent years. See J.A. 37-38; *United States v. Nyhuis*, 8 F.3d 731, 735 (11th Cir. 1993), cert. denied, 115 S. Ct. 56 (1994); *United States v. Lindsay*, 985 F.2d 666, 670 (2d Cir.), cert. denied, 114 S. Ct. 103 (1993); *United States v. Chambers*, 944 F.2d 1253, 1268 (6th Cir. 1991), cert. denied, 502 U.S. 1112 and 503 U.S. 989 (1992); *United States v. Devine*, 934 F.2d 1325, 1342 (5th Cir.), cert. denied, 502 U.S. 929 (1991), 502 U.S. 1047, 1064, 1065, 1092 & 1104 (1992). As discussed, however, this case in any event turns on congressional intent, not whether the CCE and drug conspiracy statutes define the same offense for double jeopardy purposes. Accordingly, in our view, it is not necessary to resolve that issue in this case.

⁶ See *United States v. Bond*, 847 F.2d 1233, 1239 (7th Cir. 1988) (“*Jeffers* treated [CCE and a Section 846 drug conspiracy] as sufficiently distinct to support separate convictions (even to allow sequential trials), but not sufficiently distinct to support cumulative punishments.”); see also *United States v. Ganci*, 47 F.3d 72, 73 (2d Cir. 1995) (citing *Jeffers* for the proposition that dual convictions for CCE and drug conspiracy do not violate the Double Jeopardy Clause).

(opinion of Blackmun, J.), and he was sentenced to a concurrent term of life imprisonment and a separate fine of \$100,000 for the CCE, *id.* at 145. This Court did not require either of the convictions or either of the prison sentences to be vacated. It did, however, roll back the CCE fine to \$75,000 “so that the two fines together do not exceed \$100,000,” *id.* at 158, the statutory maximum fine for the CCE offense at that time and the amount that would have been imposed had the defendant been convicted only of the CCE offense.⁷

Jeffers differs from this case in one respect. Unlike in this case, in *Jeffers* the Section 846 drug conspiracy and the CCE conviction were separately prosecuted. This Court declined to review *Jeffers'* Section 846 conviction. See *Jeffers v. United States*, 423 U.S. 1066 (1976). Therefore, the Court had before it only the CCE conviction and sentence. Moreover, since the Court concluded that the separate prosecution of the CCE and drug conspiracy charges did not violate the Double Jeopardy Clause's protection against multiple prosecutions, see 432 U.S. at 147-154 (opinion of Blackmun, J.); *id.* at 158 (White, J.,

⁷ The four-Member plurality represented by Justice Blackmun's opinion, together with Justice White (who believed that CCE and a drug conspiracy were entirely distinct offenses, see 432 U.S. at 158), formed a majority for affirming the conviction and prison sentence. Eight Members of the Court—all but Justice White—voted in favor of partially rolling back the fine. See *id.* at 154-158 (opinion of Blackmun, J.); *id.* at 158-160 (Stevens, J., dissenting in part and concurring in the judgment in part). In view of Justice White's opinion, petitioner errs in stating (Br. 10) that the Court was “unanimous[.]” in holding that cumulative punishments for CCE and drug conspiracy were barred.

concurring in the judgment in part and dissenting in part), it would have given the defendant a windfall if the Court had nonetheless reversed his conviction or sentence on the more serious offense, the later prosecuted CCE charge. Accordingly, the Court's disposition of the two convictions in *Jeffers* does not, strictly speaking, govern the disposition of a case like this, in which the defendant was tried in a single proceeding for both CCE and a Section 846 drug conspiracy, and in which the Court has before it both convictions and sentences. We nevertheless believe that the result in *Jeffers* appropriately reflects Congress's intent with regard to punishment in cases in which the defendant is convicted of CCE and of a Section 846 drug conspiracy based on the same agreement.⁸

2. Petitioner argues (Br. 10) that "the Court [in *Jeffers*] concluded * * * that Congress did not intend to authorize cumulative punishment for conduct that violates both the conspiracy and CCE statutes, and that the Double Jeopardy Clause therefore bars such cumulative punishment." If petitioner intends to suggest that the Court determined in *Jeffers* that Congress intended to bar dual convictions

⁸ The Third Circuit's approach to cases of this sort is somewhat similar to that of the Seventh Circuit. When a defendant is convicted of CCE and a Section 846 drug conspiracy based on the same agreement, the Third Circuit permits the sentencing court to enter two convictions and a single, general sentence on both counts, not to exceed the punishment available on the most serious offense. See *United States v. Fernandez*, 916 F.2d 125 (3d Cir. 1990), cert. denied, 500 U.S. 948 (1991). We believe that the Seventh Circuit's concurrent sentence approach is the better practice and more precisely coincides with the result in *Jeffers*.

and concurrent sentences for CCE and Section 846 drug conspiracy, he is mistaken. As explained above, the Court in *Jeffers* left intact the defendant's dual convictions and concurrent sentences. The decision thus could not be read to prohibit them. Instead, the plurality in *Jeffers* used the term "cumulative sentences" to refer to a different issue: the permissibility of "pyramiding" sentences, i.e., permitting consecutive sentences that resulted in total punishment greater than would have been imposed for the more serious of the two offenses.⁹ The plurality found such "cumulative penalties" to be improper. 432 U.S. at 157 (opinion of Blackmun, J.) (concluding that "Congress did not intend to impose cumulative penalties under §§ 846 and 848"); see also *id.* at 160 (opinion of Stevens, J.) (concurring in the judgment "to the extent that it vacates the cumulative fines"). But, since petitioner was not subject to that sort of "cumulation" or "pyramiding" of penalties, the Court's decision in *Jeffers* provides no support for his position that the mere entry of dual convictions and concurrent sentences is impermissible.¹⁰

⁹ *Jeffers*, 432 U.S. at 156-158 (opinion of Blackmun, J.) (discussing the issue of "pyramiding," and concluding that the sentencing court had "no power * * * to impose * * * a fine greater than the maximum permitted by § 848" for the two convictions). Ordinarily, the penalty for violating the CCE statute is higher than that for violating Section 846. There may be some unusual situations, however, in which the application of the Sentencing Guidelines leads to the opposite result. See, e.g., *United States v. Jelinek*, 57 F.3d 655, 660 (8th Cir. 1995), petition for cert. pending, No. 95-5343; *United States v. Chambers*, 944 F.2d at 1268-1269.

¹⁰ As petitioner observes (Br. 11), since *Jeffers* was decided, Congress has amended both the CCE and drug conspiracy

3. An examination of the structure, history, and purposes of the CCE and drug conspiracy statutes confirms that the *Jeffers* result is what Congress intended. Congress did not structure the CCE offense simply as a multiplier or aggravation of a Section 846 drug conspiracy. The CCE offense is defined in a separate statutory provision, 21 U.S.C. 848. That definition of the CCE offense makes no reference to Section 846, the drug conspiracy statute, just as Section 846 defines the drug conspiracy offense without reference to the CCE statute. Moreover, the definition of a CCE creates a complex, hybrid offense, which has aspects of both an offense requiring concerted activity ("in concert with") and a substantive offense (requirement of commission of "a continuing series of [drug] violations * * * from which [the defendant] obtains substantial income or resources"). By contrast, Section 846 defines a pure conspiracy offense; there is no requirement that any overt act be committed. *United States v. Shabani*, 115 S. Ct. 382 (1994). The penalties for CCE are also prescribed independently of the penalties for any other drug offense, and they are among the most severe penalties in federal law. See 21 U.S.C. 848(b) (life imprisonment without possibility of release); 21 U.S.C. 848(e) (death penalty). The penalties for a Section 846 drug conspiracy depend on the penalties

statutes, but has elected not to modify the penalty scheme in any respect that bears on the question of multiple punishments. That cannot be construed as congressional acquiescence in a rule that dual convictions and concurrent sentences are impermissible for CCE and a Section 846 drug conspiracy based on the same agreement, since neither *Jeffers* nor any other case decided by this Court adopted such a rule.

prescribed for the crimes that are the object of the conspiracy, and do not refer to or depend on the penalties set forth for CCE.

All of those features suggest that Congress intended to create a distinct statutory offense when it enacted the CCE statute, and that it viewed the commission of that offense as an order of magnitude more serious than the participation in a simple Section 846 drug conspiracy. In light of those distinctions, it is appropriate to presume that Congress intended to permit dual convictions with concurrent sentences for violation of the drug conspiracy statute and the CCE offense, particularly in view of the practical disadvantages to the government of a contrary rule and the absence of adverse collateral consequences to a defendant from the entry of such a judgment, see pp. 20-24, *infra*. It is true that the *Jeffers* plurality found that Congress did not intend to permit "pyramiding" of penalties for CCE by imposing consecutive terms of imprisonment or cumulative fines for violations of CCE and Section 846 based on the same agreement. 432 U.S. at 156 (opinion of Blackmun, J.). See also *Garrett*, 471 U.S. at 794-795 (stating that *Jeffers* plurality "reasonably concluded" that there would be little purpose in imposing cumulative penalties). But that does not mean that Congress intended to bar dual convictions and concurrent prison sentences for violation of the CCE and drug conspiracy statutes, so long as the total prison term and fine does not exceed that which would have been imposed for the CCE violation alone.

4. The decision in *Ball v. United States*, 470 U.S. 856 (1985), on which petitioner places his primary reliance¹ (see Pet. Br. 12-19), does not require a

contrary conclusion. In *Ball*, the defendant, who had previously been convicted of a felony, was charged with receiving a firearm as a convicted felon, in violation of 18 U.S.C. 922(h)(1) (1982), and for possessing that same firearm as a convicted felon, in violation of 18 U.S.C. App. 1202(a)(1) (1982). The trial court imposed consecutive sentences for the two convictions, and the court of appeals accepted the government's concession that such consecutive sentences were improper. The court of appeals held that Congress "did not authorize pyramiding penalties," 470 U.S. at 858 (quoting *United States v. Ball*, 734 F.2d 965, 966 (4th Cir. 1984)), and ordered that the sentences be modified to run concurrently.

This Court held that it was permissible to indict and try a defendant on both counts, even when "a single act is relied upon to establish [the defendant's] unlawful receipt and his unlawful possession of the same firearm." 470 U.S. at 859. But, the Court held, "[a]ll guides to legislative intent * * * show that Congress intended a felon in [the defendant's] position to be convicted and punished for only one of the two offenses if the possession of the firearm is incidental to receiving it." *Id.* at 861. Because Congress intended only one conviction and, *a fortiori*, only one punishment to be imposed, "[t]he remedy of ordering one of the sentences to be served concurrently with the other cannot be squared with Congress' intention." *Id.* at 864. Accordingly, the Court remanded for the district court to vacate one of the convictions. *Id.* at 865.

Unlike in *Ball*, "[a]ll guides to legislative intent" do not suggest that Congress wanted to preclude dual convictions and concurrent sentences in this case.

The structural relationship, purposes, and history of the offenses at issue in *Ball*—receiving and possessing a gun—differ significantly from the offenses at issue in this case. In addition, the practical consequences of permitting dual convictions and concurrent sentences in *Ball* differ substantially from the consequences of doing so in the context of this case.

a. Initially, the overlap between the offenses of illegally receiving and possessing a gun as a convicted felon is virtually complete. All cases of illegal receipt of a gun are also cases of illegal possession. *Ball*, 470 U.S. at 862. And virtually all cases of illegal possession are also cases of illegal receipt; the only exception would appear to be the extraordinary cases in which the defendant manufactured the gun himself. *Id.* at 862 n.9. Thus, Congress would reasonably have expected that convicted felons who possess guns will always—or virtually always—be guilty of both offenses, and there is no reason to think that Congress would have intended more than one conviction and sentence to be entered for that form of violation.

The same cannot be said for CCE and a Section 846 drug conspiracy; many drug conspiracy cases will not involve commission of a CCE offense by anyone. Moreover, even where some of the members of a Section 846 drug conspiracy also commit the CCE offense, others—who did not "occup[y] a position of organizer, a supervisory position, or any other position of management," 21 U.S.C. 848(c)(2)(A), or who did not "obtain[] substantial income or resources" from the venture, 21 U.S.C. 848(c)(2)(B)—could not be convicted of the CCE offense. The

overlap between the two statutes is much less than in *Ball*.

b. The history of the receipt and possession statutes also demonstrates that Congress intended the two as alternatives. As the Court noted in *Ball*, the receipt statute was "part of a carefully constructed package of gun control legislation, which had been in existence for many years." 470 U.S. at 862 (internal quotation marks omitted). By contrast, the possession statute was a "last-minute Senate amendment" to the statute that was "hastily passed, with little discussion, no hearings, and no report." *Id.* at 863. It was "enacted as supplementary legislation," and was intended to "fill[] the gaps in and expand[] the coverage of" the receipt statute. *Ibid.* Based on that history, the Court in *Ball* was "persuaded that Congress had no intention of creating duplicative punishment for one limited class of persons falling within the overlap between the two [statutes]." *Id.* at 864.

No such inference can be drawn from the relationship between the CCE offense and a Section 846 drug conspiracy. There is no reason to believe that either statute was intended to fill gaps in coverage created by the other, nor is there any basis for inferring that Congress intended one as an alternative to the other. Rather, both statutes were intended independently to define violations of the narcotics laws.

c. In addition, unlike in *Ball*, practical concerns suggest that Congress would not have intended to prohibit separate convictions and concurrent sentences for a CCE and drug conspiracy based on the same agreement. One of the reasons for entering dual convictions and concurrent sentences in a case like this is that it is possible that the defendant could,

either on direct review or years later on collateral attack, obtain reversal of the CCE conviction. Given the hybrid nature of the CCE offense, a reversal could stem from trial error or insufficiency of proof that relates only to the elements that clearly distinguish a CCE from a simple conspiracy: the existence of the "continuing series of violations"; the requirement that the defendant act in concert with "five or more persons"; the need to show that the defendant played a supervisory role; or the requirement that the defendant have obtained "substantial income or resources" from his violations. Such a reversal would provide no basis for upsetting the drug conspiracy conviction. Congress would no doubt have realized that a separate conviction and concurrent sentence for the drug conspiracy offense would be the simplest and most effective way to ensure that the defendant who obtains reversal of his CCE conviction on such a ground would still be appropriately punished for the drug conspiracy that he committed. See *United States v. Bond*, 847 F.2d 1233, 1239 (7th Cir. 1988).

Those practical concerns have no force in the *Ball* situation. Because the elements of the offenses of illegal receipt and illegal possession of a gun are virtually coextensive, a defendant could rarely if ever obtain a reversal of his conviction on one of the two offenses without also demonstrating that he is entitled to a reversal on the other. Congress therefore might have intended, as *Ball* held it did, that there be only one conviction for that same conduct, without creating any realistic risk that a defendant might someday evade just punishment for his conduct as a result of entering only a single count of conviction. Unlike in this case, Congress's intent

to preclude separate convictions and concurrent sentences in that situation in *Ball* may reasonably be inferred.

d. Finally, the threat of adverse consequences for the defendant is much less here than in *Ball*. The Court explained in *Ball* that there were two adverse consequences of the separate conviction and concurrent sentence. First, “the presence of two convictions on the record may * * * result in an increased sentence under a recidivist statute for a future offense.” 470 U.S. at 865.¹¹ Second, “the second conviction may be used to impeach the defendant’s credibility and certainly carries the societal stigma accompanying any criminal conviction.” *Ibid.* Neither of those concerns generally exists in the case of dual CCE/Section 846 drug conspiracy convictions.

With respect to sentencing under recidivist provisions, the federal Sentencing Guidelines—which came into effect after this Court’s decision in *Ball*—would not produce an enhanced sentence in a subsequent sentencing merely because of the entry of dual CCE/drug conspiracy convictions based on the same agreement. The Guidelines use the number and characteristics of prior sentences—not the raw number of convictions—to calculate the defendant’s criminal history category. See Guidelines § 4A1.1.

¹¹ The Court in *Ball* also noted that the presence of two convictions “may delay the defendant’s eligibility for parole.” 470 U.S. at 865. Since parole has now been abolished in the federal system, see Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, §§ 212, 218, 98 Stat. 1987, 2027, that no longer is an adverse consequence of the entry of two convictions.

But “[p]rior sentences imposed in related cases are to be treated as one sentence for purposes of” the calculation. Guidelines § 4A1.2(a)(2). A CCE and a Section 846 drug conspiracy sentence based on the same agreement and tried at the same time would be considered “related” under the Guidelines. See Guidelines § 4A1.2, Application Note 3. The Guidelines instruct sentencing courts to “[u]se the longest sentence of imprisonment if concurrent sentences were imposed.” Guidelines § 4A1.2(a)(2). Thus, under the Guidelines regime, a defendant in petitioner’s position would not suffer any adverse consequences in a future sentencing proceeding from having received dual convictions and concurrent sentences.¹²

With respect to the “societal stigma” or impeachment value attached to the second conviction, it is

¹² Congress has required a mandatory life sentence for certain drug distribution violations involving particularly large quantities of controlled substances if the defendant commits the offense “after two or more prior convictions for a felony drug offense have become final.” 21 U.S.C. 841(b)(1)(A). See 21 U.S.C. 802(43) (to be codified in 1994 edition) (defining “felony drug offense”). The courts of appeals would not count the CCE and drug conspiracy convictions in a case like this as separate convictions for purposes of that provision, especially if the CCE and drug conspiracy offenses are viewed as greater and lesser included offenses. See, e.g., *United States v. Liquori*, 5 F.3d 435, 437 (9th Cir. 1993) (citing cases), cert. denied, 114 S. Ct. 738 (1994).

It is also possible that a defendant convicted of CCE and a Section 846 drug conspiracy based on the same agreement could in some future case face a state sentencing court, where the federal Guidelines would be of no relevance. But it is unlikely that Congress fashioned its penalties for federal felony drug violations in light of possible collateral consequences under state law.

important to recognize that the CCE offense is one of the most serious criminal offenses in federal law. It is therefore doubtful that a defendant, once convicted of CCE, would suffer any incremental stigma as a result of the fact that he was also convicted of a Section 846 drug conspiracy based on the same agreement. Indeed, in light of the fact that there would be a jury verdict of guilty on the Section 846 charge that would be a matter of public record, the defendant would be extraordinarily unlikely to suffer any additional stigma from the additional conviction. Even if there were some increment of societal stigma or potential for impeachment that would attach to the drug conspiracy conviction, however, there would be no reason to believe that Congress, having created the CCE offense with its extraordinary penalties, would have been concerned that some CCE defendants would suffer such a relatively minor adverse consequence. Therefore, it would provide no basis for inferring that Congress would have wanted to preclude dual convictions in this situation.

II. IF THE COURT CONCLUDES THAT THE ENTRY OF SEPARATE CONVICTIONS AND CONCURRENT SENTENCES CONTRAVENES CONGRESSIONAL INTENT, THE APPROPRIATE COURSE WOULD BE TO REQUIRE ENTRY OF A SINGLE, MERGED CONVICTION AND SENTENCE ON THE TWO COUNTS

Those courts of appeals that do not permit the entry of a separate conviction or concurrent sentence for CCE and a Section 846 drug conspiracy based on the same agreement have adopted three different approaches to the treatment of the dual jury verdicts of guilty in such a case. In our view, the approach

developed by the Second Circuit of combining or merging the two counts into a single conviction best accommodates the interests of the government in ensuring that the defendant receive just punishment for the crimes he has committed and the interests of the defendant in avoiding adverse collateral consequences.

1. The Second Circuit has held that the appropriate course when the jury finds the defendant guilty of CCE and drug conspiracy based on the same agreement is to "combine" the two convictions in a single count, for which the punishment may not exceed that applicable to the greater offense. See, e.g., *United States v. Aiello*, 771 F.2d 621, 632-635 (2d Cir. 1985). Under that approach, "the conviction[] for the lesser offense[] would cease to exist unless the conviction for the greater offense should be reversed, in which event the defendant could be punished for the lesser offense[]." *Id.* at 632. At that time, "[a]ny time already served would be counted as credit against the newly imposed sentence." *Id.* at 634. Presumably, any fine already imposed would also be credited against any newly imposed fine. As we understand it, the judgment in such a case would indicate that a single conviction is being entered for two offenses.

The reason for the Second Circuit's approach is that, if the defendant succeeds in having his conviction for the greater offense overturned on appeal or on collateral attack, the defendant should not have the windfall of avoiding punishment altogether for the second offense. See *Aiello*, 771 F.2d at 633-634. See also *United States v. Lindsay*, 985 F.2d 666, 670-671 (2d Cir.), cert. denied, 114 S. Ct. 103 (1993); *United States v. Benevento*, 836 F.2d 60, 73 (2d Cir. 1987),

cert. denied, 486 U.S. 1043 (1988). Cf. *Tinder v. United States*, 345 U.S. 565, 569-570 (1953) (remanding case for entry of conviction and sentence on lesser included misdemeanor after felony conviction was overturned). The defendant, however, suffers no adverse consequences from the entry of the single, merged conviction. In any future recidivist proceeding, there would be only one conviction on the defendant's record, covering both the CCE and Section 846 drug conspiracy offenses. Nor would defendant suffer any other adverse consequences; there is no reason to believe that the "societal stigma" to which such a defendant would be subject would be any greater than that to which he would have been subjected had he been convicted only of a CCE violation. Cf. *Ball*, 470 U.S. at 865.

In our view, if dual convictions and concurrent sentences are held improper, the Second Circuit's approach best accommodates the interests of the government and is consistent with Congress's probable intent. In addition, it ensures that the defendant will receive the punishment that he deserves, while protecting the defendant against any possible adverse consequences.

2. Based on concerns similar to those underlying the Second Circuit's "combination" approach, the Ninth Circuit has taken a somewhat different course. Although the Ninth Circuit has not specifically addressed the issue in a case where a defendant was convicted of CCE and a Section 846 drug conspiracy, that court has adopted a general approach for cases in which it is permissible to charge and try a defendant for two offenses, but to enter only one conviction. The Ninth Circuit has held that the appropriate

course of action in such a case is to "stay[] both the sentence and entry of judgment of conviction on all but one count." *United States v. Palafox*, 764 F.2d 558, 564 (9th Cir. 1985) (en banc).¹³ If the conviction that is entered is ultimately reversed on appeal or on collateral attack, the district court could then enter a judgment of conviction and sentence on the remaining count. That would ensure "that the defendant is punished, but punished only once," and "[i]t avoids both the punitive collateral effects of multiple convic-

¹³ The Ninth Circuit's procedure mirrors that formerly followed by some courts under the concurrent sentence doctrine. After affirming one of two convictions on which sentence ran concurrently, those courts would vacate the judgment with respect to the other, but note that the sentence and conviction could be reimposed at a later date in the event that a defect were discovered in the conviction that was affirmed. See, e.g., *United States v. De Bright*, 730 F.2d 1255 (9th Cir. 1984) (en banc); *United States v. Butera*, 677 F.2d 1376, 1386 (11th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); *United States v. Hooper*, 432 F.2d 604, 606 n.8 (D.C. Cir. 1970). But see, e.g., *United States v. Vargas*, 615 F.2d 952, 960 (2d Cir. 1980) (applying the concurrent sentence doctrine to leave undisturbed the unreviewed district court judgment); *United States v. Lampley*, 573 F.2d 783, 788 (3d Cir. 1978) (same); *United States v. Nelson*, 733 F.2d 364, 371 n.17 (5th Cir.) (same), cert. denied, 469 U.S. 937 (1984); *United States v. Peters*, 617 F.2d 503, 506 (7th Cir. 1980); *United States v. Wilson*, 671 F.2d 1138, 1139 n.2 (8th Cir.) (same), cert. denied, 456 U.S. 994 (1982). Under 18 U.S.C. 3013, a special assessment must be imposed with respect to each offense on which the defendant is convicted. Since each offense now carries with it a cumulative special assessment, the concurrent sentence doctrine now has virtually no application in the federal system. See *Ray v. United States*, 481 U.S. 736 (1987) (per curiam).

tions as well as the direct effects of multiple sentences." *Ibid.*¹⁴

In our view, although the Ninth Circuit approach represents a partial accommodation of the important interests at stake in cases of this sort, the Second Circuit's approach is preferable. Initially, if the CCE conviction were ever overturned, it is possible that speedy trial or related concerns could be thought to threaten the ability of the government to obtain a new judgment on the Section 846 jury verdict that has been held in abeyance. That could add needless complexity to the process of ensuring that the defendant receives the punishment Congress intended for his participation in the Section 846 drug conspiracy.

In any event, the Ninth Circuit's approach could interfere with the strong policy against piecemeal appeals in criminal cases. In an initial appeal in such a case, the defendant could not raise—and the court could not decide—any issue that concerns only the Section 846 drug conspiracy conviction, for the only issue before the appellate court would be whether the

¹⁴ The Ninth Circuit has employed the *Palafox* approach in subsequent cases involving dual convictions where cumulative punishments could not be imposed, although none of those cases specifically involved convictions for drug conspiracy and CCE. See, e.g., *United States v. Compton*, 5 F.3d 358, 360 (9th Cir. 1993); *United States v. Sanchez-Lopez*, 879 F.2d 541, 549-550 (9th Cir. 1989); *United States v. Sanchez-Vargas*, 878 F.2d 1163, 1172 (9th Cir. 1989); *United States v. Andersson*, 813 F.2d 1450, 1460-1462 (9th Cir. 1987). Compare *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1582 (9th Cir. 1989) (holding that conviction on drug conspiracy offense must be vacated in light of CCE conviction, but not stating whether drug conspiracy conviction could be revived if CCE conviction were ever overturned), cert. denied, 497 U.S. 1003 (1990).

CCE conviction and sentence is valid. Indeed, there is some possibility that a judgment that purports to stay disposition of the drug conspiracy count would be insufficiently final to support an appeal. See *United States v. Luciano-Mosquera*, Nos. 92-1923 et al., 1995 WL 500601, at *3 n.2 (1st Cir. Aug. 28, 1995) ("[A] criminal judgment involving multiple counts is not final and appealable unless the record discloses the precise disposition (e.g., the sentence) for each count."); *United States v. Wilson*, 440 F.2d 1103, 1104 (5th Cir.), cert. denied, 404 U.S. 882 (1971) & 405 U.S. 1016 (1972). Even if such a partial disposition of the case could support an appeal, legal issues concerning the validity of the Section 846 drug conspiracy conviction could lie dormant for years, until and unless it is necessary to enter judgment on that conviction. Only at that time could the issues be brought before the court of appeals.

Under the Second Circuit's approach, such piece-meal appeals would be avoided; the defendant could (and should) challenge any defects regarding both the CCE and the drug conspiracy charges on his initial appeal of the merged conviction. Indeed, the validity of both charges would be squarely before the court at that time, since a reversal on the ground of a defect in the CCE count would lead only to a remand for resentencing, while a reversal on the ground of one or more defects affecting both the CCE and drug conspiracy counts would lead to a remand for vacatur of the conviction. See *Aiello*, 771 F.2d at 634 n.8.

3. Several courts have held simply that a defendant may be convicted of only one offense (the CCE or the drug conspiracy) and that a judgment imposing two convictions must be set aside and remanded for

the district court to vacate one of the convictions—presumably, the lesser one.¹⁵ Those courts have not made clear whether a conviction on the Section 846 drug conspiracy count could later be entered if the CCE conviction were ever overturned on collateral attack. If those courts would permit such a conviction to be entered, their approach is essentially identical with that adopted by the Ninth Circuit. If they would not permit such a conviction to be entered, however, their approach is mistaken. It would permit a defendant who engages in a drug conspiracy in violation of Section 846 and who is properly tried and found guilty by a jury for that violation to escape without conviction or punishment, so long as he was also convicted of a CCE offense at the same time and that CCE conviction is later found to be defective. That is not a plausible understanding of Congress's intent regarding punishment for defendants who commit both Section 846 drug conspiracy and CCE violations. Nor is it necessary to achieve any other legitimate goal. Accordingly, it should be rejected.

¹⁵ See *United States v. Cloutier*, 966 F.2d 24, 30-31 (1st Cir. 1992); *United States v. Butler*, 885 F.2d 195, 201-202 (4th Cir. 1989); *United States v. Chambers*, 944 F.2d at 1268-1269; *United States v. Rivera*, 900 F.2d 1462, 1478 (10th Cir. 1990) (en banc); *United States v. Cruz*, 805 F.2d 1464, 1479 (11th Cir. 1986), cert. denied, 481 U.S. 1006 & 482 U.S. 930 (1987). The Eighth Circuit has adopted an approach whereby the district court may enter two convictions, which the court of appeals reviews on appeal. If both are upheld, however, the court of appeals remands the case to the district court for vacatur of one of the convictions. *United States v. Jelinek*, 57 F.3d 655 (8th Cir. 1995), petition for cert. pending, No. 95-5343.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 21 U.S.C. 846 provides as follows:

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

2. 21 U.S.C. 848 provides in relevant part as follows:

§ 848. Continuing criminal enterprise

(a) Penalties; forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount

(1a)

authorized in accordance with the provisions of title 18 or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

(b) Life imprisonment for engaging in continuing criminal enterprise

Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a) of this section, if—

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2)(A) the violation referred to in subsection (d)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received \$10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

(c) "Continuing criminal enterprise" defined

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(d) Suspension of sentence and probation prohibited

In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C. Code, secs. 24-203—24-207), shall not apply.

(e) Death penalty

(1) In addition to the other penalties set forth in this section—

(A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) of this title who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death; and

(B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter II of this chapter who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer's official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

(2) As used in paragraph [(1)(B)], the term "law enforcement officer" means a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense, and includes those engaged in corrections, probation, or parole functions.

* * * * *

(8)

Supreme Court, U.S.

F I L E D

No. 94-8769

NOV 9 1995

IN THE

CLERK

Supreme Court of the United States

OCTOBER TERM, 1995

TOMMY L. RUTLEDGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
*Respondent.*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**REPLY BRIEF FOR PETITIONER**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

TOMMY L. RUTLEDGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF FOR PETITIONER

ARGUMENT

In its brief, the Government does not come to terms with the interrelation between this Court's decisions in *Jeffers v. United States* and *Garrett v. United States* on the one hand, and *Ball v. United States* on the other. Instead, the Government focuses on the unique procedural posture of *Jeffers* — the fact that the defendant created his own double jeopardy problems by insisting upon multiple prosecutions — while ignoring the fact that the *Jeffers* Court recognized a multiple punishments issue that *Jeffers* and the Government both had overlooked. The Court deemed this Fifth Amendment issue important enough to address nevertheless, and framed the "critical inquiry" as "whether Congress intended to punish each statutory violation separately." *Jeffers v. United States*, 432 U.S. 137, 154-55 (1977). The Court's answer is negative: the reduction of the criminal fine that this Court ordered in *Jeffers*

followed directly from its specific conclusion that "Congress did not intend to impose cumulative penalties under §§ 846 and 848" in cases where the same criminal agreement supported the separate charges under those two statutes. *Id.* at 157.

Bounded by the holding in *Jeffers*, which was noted with approval in *Garrett v. United States*, 471 U.S. 773, 794 (1985), the Government seeks to put a fine point on Congress's intent: acknowledging that Congress did not authorize pyramiding punishments under §§ 848 and 846, which Congress could have done under *Missouri v. Hunter*, 459 U.S. 359 (1983), the Government contends that Congress did intend to authorize multiple convictions with concurrent sentences. The Government's reading of Congressional intent is highly unlikely — if Congress really saw these as separate and distinct offenses meriting separate and distinct convictions and punishments it likely would have authorized pyramiding their sentences — and the Government offers no clear expression of this unlikely intent from Congress.

Moreover, *Ball*, which was decided earlier in the same term as *Garrett*, bars the entry of multiple judgments of conviction, as well as the imposition of concurrent sentences, in cases where Congress did not intend the same conduct to be punished under two statutes: "the second conviction, even if it results in no greater sentence, is an impermissible punishment." *Ball v. United States*, 470 U.S. 856, 865 (1985). Applying *Ball*'s holding concerning judgments of conviction to the findings of *Jeffers* and *Garrett* concerning Congressional intent leads to the conclusion, adopted by a significant majority of the courts of appeals (see Pet. Br. 17-18), that the Double Jeopardy Clause forbids even the entry of separate judgments under both §§ 846 and 848 when both charges are based on the same scheme.

The Government seeks to circumvent this analysis by arguing that the unique relationship between another pair of statutes at issue in *Ball* generated the conclusion that Congress did not intend to allow multiple judgments of conviction for the same conduct, and

that no such conclusion is warranted here with respect to 28 U.S.C. §§ 846 and 848. (See U.S. Br. 17-24). However, as shown below, there are no material differences between the two sets of statutes to support the Government's speculative distinctions concerning Congressional intent. This Court has concluded that Congress did not intend cumulative punishment with respect to either the weapons statutes in *Ball* or the statutes in the case at bar. In both situations the mere entry of judgment of conviction operates as a punishment. Nowhere in its argument does the Government offer a good reason why this Court should ignore the impermissibly cumulative and punitive effect of a second judgment of conviction in combined CCE and conspiracy prosecutions.^{1/}

I. ENTRY OF SEPARATE JUDGMENTS OF CONVICTION ON CCE AND CONSPIRACY VERDICTS BASED ON THE SAME CONDUCT VIOLATES THE FIFTH AMENDMENT.

A. Under *Ball*, Judgments Of Conviction And Concurrent Sentences Are Punishments For Purposes Of Applying The Holding In *Jeffers* And *Garrett* That Congress Did Not Intend Cumulative Punishment Under 21 U.S.C. §§ 846 and 848.

The Government does not dispute that, under *Jeffers* and *Garrett*, Rutledge cannot receive greater punishment as a result of

^{1/} The Government's formulation of the "Question Presented" (U.S. Br. I) suggests that the issue in this case is whether the Double Jeopardy Clause requires that the conspiracy judgment specifically be vacated in light of the CCE judgment. Rutledge respectfully suggests that the constitutional proscription of cumulative punishment not intended by the legislature is remedied so long as either one of the two judgments and the sentence thereunder is vacated. (See Pet. Br. i.) The decision as to which of the cumulative judgments and sentences should be vacated (or, in the ordinary course, not entered in the first place) belongs in the first instance to the sentencing court. See *Ball*, 470 U.S. at 864 (remedy for unconstitutionally cumulative judgments "is for the District Court, where the sentencing responsibility resides, to exercise its discretion to vacate one of the underlying convictions").

the separate guilty verdicts for violating §§ 846 and 848 than he could receive under one of those statutes, where the verdicts are based on the same conduct. (See U.S. Br. 15, 17.) That point conceded, the Government cannot limit the question of whether Rutledge's two convictions and sentences on the CCE and conspiracy charges have resulted in an impermissible greater punishment to an inquiry into whether his total prison term and fine exceed the parameters established by one statute or the other. Since each separate judgment of conviction and concurrent sentence amount to punishment, as *Ball* held, the entry of multiple judgments of conviction with concurrent sentences imposed on Rutledge resulted in a punishment that could not have been imposed under only one of the statutes. Because each judgment of conviction is in its own right a separate punishment, even if the corresponding sentences are concurrent, Rutledge has been subject to the very accumulation or "pyramiding" of criminal sanctions that the Government concedes the Fifth Amendment prohibits (see U.S. Br. 15), given the undisputed conclusion that Congress did not intend the CCE and conspiracy statutes to impose cumulative punishment for the same conduct. *Jeffers*, 432 U.S. at 157; *Garrett*, 471 U.S. at 795.²

In arguing that Rutledge's constitutional claims are governed exclusively by the intent of the legislature, the Government misses the point that the question of whether judgments of conviction and

concurrent sentences are punishments is not itself a simple question of legislative intent. In *Ball*, this Court emphasized that "'punishment' must be the equivalent of a criminal conviction and not simply the imposition of sentence." *Ball*, 470 U.S. at 861.

Decisions of this Court subsequent to *Ball* highlight the constitutional, rather than legislative, nature of what constitutes punishment for purposes of the Double Jeopardy Clause. *United States v. Halper*, 490 U.S. 435 (1989), held that the legislatively-drawn line between "civil" and "criminal" proceedings did not serve as a boundary for the Double Jeopardy Clause. *Id.* at 446-49. Instead, the question whether a sanction "constitutes punishment in the relevant [i.e., Fifth Amendment] sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." *Id.* at 448. Hence, a sanction "that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* See also *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1945 (1994) (legislative characterization is not dispositive on question of whether sanction is "punitive in character"); *id.* at 1950 (Rehnquist, C.J., dissenting) ("The Court asks the right question, . . . , but reaches the wrong conclusion"); *id.* at 1953 (O'Connor, J., dissenting) (". . . a tax imposed on the possession of illegal drugs is subject to double jeopardy analysis").

² The Government is correct in noting that, contrary to the statement in Rutledge's opening brief, this Court was not unanimous in *Jeffers* in concluding that Congress did not intend to impose cumulative punishment under the two statutes. (See Pet. Br. 10; U.S. Br. 13 n.7.) Justice White opined that the statutes in *Jeffers* involved separate offenses for purposes of the Double Jeopardy Clause under *Iannelli v. United States*, 420 U.S. 770 (1975), and that cumulative punishment consequently would be permissible under the conspiracy and CCE statutes. *Jeffers*, 432 U.S. at 158 (White, J., concurring in part and dissenting in part). Nevertheless, eight justices concluded in *Jeffers* that such cumulative punishment was forbidden under the multiple punishments protection of the Double Jeopardy Clause, and this Court (including Justice White) expressly approved that conclusion eight years later in *Garrett*.

With the guidance of *Halper*, it cannot be gainsaid that the separate and additional conviction and concurrent sentence constitute separate and additional punishment. Visiting the second conviction and sentence on Rutledge for the same conduct as the first plainly is "retributive." *Halper*, 490 U.S. at 448. Each additional conviction, and each additional sentence, even without extending the length of a sentence, exacts additional retribution. If this were not so, the Government would not fight so hard to preserve them. The ability to report to the press that a defendant is guilty of not one but two serious drug offenses, that he has received not one but two life

sentences, is the ability to subject the defendant to additional public scorn — the very same "societal stigma" that *Ball* mentioned. 470 U.S. at 865.

Therefore, while there may be no Fifth Amendment limits on Congress's power to provide for cumulative punishment in a single proceeding, *Missouri v. Hunter*, 459 U.S. 359, 365-68 (1983), the question of how to implement Congress's intent, as discerned in *Jeffers*, not to punish the same conduct under both the CCE and conspiracy statutes requires a judicial answer. *Ball* supplies that answer, by holding that the additional judgment of conviction and its concurrent sentence are additional punishment. 470 U.S. at 865.

The categorical approach of *Ball* also saves sentencing courts from having to determine whether the additional judgment and sentence may have a significant collateral consequence at some unknown point in the distant future — a task that is particularly impossible where, as here, the projected sentence is life imprisonment. (See Pet. Br. 13-16.) Indeed, for all its attempts to intimate that the additional judgment and sentence make no difference to Rutledge, the Government does not and could not contend that they will never matter.^{3/} The Government notes that under current law the additional judgment will not affect a parole decision because there is no federal parole at this time. (See U.S. Br. 22 n.11.) But no one can guarantee that parole will not be reintroduced during Rutledge's lifetime, and in a fashion where the additional judgment and sentence would defeat his eligibility. No one can guarantee that the additional judgment and sentence will not play an adverse role in determining whether Rutledge will be granted a compassionate release later in life. See Pet. Br. 16 (discussing trend towards early and compassionate release for older prisoners); Violent Crime

Control Act of 1994, Pub. L. No. 103-322, Title VII, § 70002, 108 Stat. 1984 (1994) (amending 18 U.S.C. § 3582(c)) (authorizing release of a federal prisoner who is at least 70 years old and has served at least 30 years of his sentence, if not inconsistent with Sentencing Commission policy statements). And certainly no one can guarantee that Rutledge will suffer no additional stigma from an additional conviction and life sentence, since the general public is likely to believe that an additional life sentence reflects a separate heinous crime, rather than pure prosecutorial "piling-on."^{4/} The considerations that led this Court in *Ball* to conclude that judgments of conviction and concurrent sentences are "punishment" apply with equal force here; and that conclusion requires that the district court be directed to vacate one of Rutledge's CCE and conspiracy convictions.

^{3/} For example, the Government argues that "the threat of adverse consequences for the defendant is much less here than in *Ball*" (U.S. Br. 22), not that the threat of adverse consequences does not exist. Similarly, the Government asserts that is "doubtful" (U.S. Br. 24), not impossible, that a defendant convicted of CCE will suffer an incremental stigma from the conspiracy conviction.

^{4/} Furthermore, as Rutledge specifically argued in his opening brief, the cumulative judgments already have resulted in an impermissible cumulative penalty under 18 U.S.C. § 3013, which requires separate \$50 assessments for each charge on which the sentencing court enters judgment. (See Pet. Br. 3, 16.) The government is incorrect to suggest that the question presented in Rutledge's petition and brief presupposes full concurrence of the sentence. (U.S. Br. 7 n.1.) An additional judgment of conviction automatically leads to an additional assessment under 18 U.S.C. § 3013. Likewise, *vacatur* of one of the judgments will as a matter of course result in a correspondingly reduced assessment. Consequently, the question of the validity of the cumulative assessment is at issue here as "a subsidiary question fairly included" in the question presented, which expressly challenges the cumulative judgments of conviction on the separate CCE and conspiracy counts. U.S. S. Ct. R. 14.1(a). There was no need for Rutledge to focus extensively on the additional \$50 assessment because the Government has never contended in this case that appellate review is barred by the concurrent sentences doctrine. See U.S. Br. 7 n.1, 27 n.13 ("the concurrent sentences doctrine now has virtually no application in the federal system"), citing *Ray v. United States*, 481 U.S. 736 (1986) (per curiam).

B. The Government's Reading Of Congressional Intent Ignores This Court's Prior Determination In *Jeffers* That Congress Did Not Intend To Allow Cumulative Punishment Under 28 U.S.C. §§ 846 and 848.

The parties agree that the question whether the entry of judgment on convictions for both the CCE and conspiracy counts of the indictment against Rutledge violated the Double Jeopardy Clause involves an analysis of whether Congress intended to allow punishments for both offenses. (See Pet. Br. 8; U.S. Br. 4.) In *Jeffers*, this Court considered and decided this very question. Declaring that the "critical inquiry" on the multiple punishments issue was "whether Congress intended to allow cumulative punishment for violations of §§ 846 and 848," this Court unambiguously stated, "We have concluded that it did not. . . ." *Jeffers*, 432 U.S. at 155. The Court based this conclusion on a thorough analysis of the structure, policy, and legislative history of the statutes. *Id.* at 156-57.

Notwithstanding this Court's clear holding to the contrary, the Government argues that Congress must have intended to allow dual convictions and concurrent sentences for violations of both statutes based on the same agreement. To avoid the *Jeffers* holding, the Government argues that this Court's discussion of Congress's intent not to allow "cumulative punishment" merely referred to extending the length of incarceration or increasing the amount of the fine. (U.S. Br. 15.) To support this overly narrow view of *Jeffers*, the Government states that the end result in *Jeffers* was that the Court left intact the defendant's multiple convictions and concurrent sentences, and simply reduced the total fines so that they would not exceed the maximum provided under both statutes. From this, the Government argues that if this Court really meant that Congress had not "intended to punish each statutory violation separately," 432 U.S. at 155, it would have vacated one of the convictions.

The Government's argument fails for two reasons. *First*, this Court had not yet addressed the question whether two separate

convictions and concurrent sentences for the same conduct constitute separate punishment for purposes of the Double Jeopardy Clause. This Court did not address the issue until *Ball*, eight years after *Jeffers*. It is the combination of this Court's finding in *Jeffers* that Congress did not intend "cumulative punishment" and its holding in *Ball* that an additional conviction and concurrent sentence constitutes cumulative punishment which establishes that Rutledge's constitutional rights have been violated.

Second, the procedural history and the arguments presented to this Court in *Jeffers*, and not a narrow view of the double jeopardy protection, led to the limited nature of the relief granted in that case. *Jeffers* had insisted on being tried separately on the conspiracy and CCE counts; he demanded multiple prosecutions and got them by objecting to the Government's request for a single trial. As a consequence, his conspiracy conviction had been affirmed and the certiorari petition therefrom denied, 423 U.S. 1066 (1976), even before the court of appeals had ruled on the appeal from his CCE conviction, 532 F.2d 1101 (7th Cir. 1976). With only the CCE life sentence before it, there was little the Court could have done, even if it had been properly alerted to the issue raised by the concurrent sentences.⁵ But in addition, *Jeffers* failed to alert the Court to the constitutional issue raised by the concurrent sentences. To the contrary, *Jeffers* informed the Court "that this is not a case of multiple punishments but a case of multiple prosecutions." Brief for Petitioner at 21, *Jeffers v. United States*, 432 U.S. 137 (1977) (No. 75-1805). Because *Jeffers* never raised this issue, later to be addressed in *Ball*, the Court simply dismissed the question of the

⁵ Because it had tried to avoid the problem by seeking a single trial for all counts, vacating the CCE conviction with its lengthier sentence would not have been fair to the Government. If the conspiracy conviction had been before the Court at the same time, it could have vacated the 15-year prison sentence for that conviction entirely and still left *Jeffers* with the life sentence on the CCE conviction. With only the life term before it, though, the Court could not take the same approach it had used with respect to the fines and reduce his life sentence to "life minus fifteen years."

concurrent prison terms without analysis in a footnote. 432 U.S. at 155 n.24.

Given the Government's willingness to assume that §§ 848 and 846 here define the "same offense" for purposes of *Blockburger v. United States*, 284 U.S. 299 (1932), an assumption that is well-founded,⁶ the Government's brief is remarkable for the absence of any reference to a "clear indication" by Congress of an intent to permit multiple convictions and sentencing for CCE and conspiracy convictions. See *Whalen v. United States* 445 U.S. 684, 691-92 (1980). Instead of any clear statement of Congressional intent, the Government offers supposition and conjecture regarding why it is "appropriate to presume" (U.S. Br. 17) that Congress intended to allow multiple punishments under §§ 848 and 846. But the fact that

⁶ Were it necessary actually to resolve the "same offense" question, the result would be the same because conspiracy is in fact a lesser included offense of CCE. Conspiracy and CCE are the "same offense" under the *Blockburger* test because there is no element in the conspiracy offense that is not also an element of the CCE offense. "Every minute" that a defendant was committing a CCE violation, "he was simultaneously committing both the lesser included [offense] and the greater felony." See *Garrett*, 471 U.S. at 789 (discussing *Brown v. Ohio*, 432 U.S. 161 (1977)). The Government's position to the contrary, to which it still adheres in theory (see U.S. Br. 11-12 n.5), depends on the implausible contention that a group of people act "in concert" even though one or more of those people is unaware of the underlying scheme or purpose of the action. That interpretation of the CCE statute defies the plain meaning of "concerted action." See, e.g., *Black's Law Dictionary* 289 (6th ed. 1986) (defining "concerted action" as "Action that has been planned, arranged, adjusted, agreed on and settled between parties acting together pursuant to some design or scheme"); 1 *Webster's Third New International Dictionary* 470 (1986) (defining "concerted" as "mutually contrived or planned; agreed on"); 1 *New Shorter Oxford English Dictionary* 467 (1990) (defining "concert" as "Agreement in a plan or design; accordance, harmony"). This Court has already noted that "[s]ince the word 'concert' commonly signifies agreement of two or more persons in a common plan or enterprise, a clearly articulated statement from Congress to the contrary would be necessary before that meaning should be abandoned." *Jeffers*, 432 U.S. at 149 n.14. As the Government acknowledges, in recent years the courts of appeals have rejected unanimously the argument that conspiracy is not a lesser included offense in single agreement cases such as this one. (See U.S. Br. 12 n.5.)

§ 848 adds to the "agreement" element it shares with § 846 an element requiring proof of the commission of substantive drug offenses is not a clear indication that Congress intended to authorize concurrent (but only concurrent) sentences for CCE and conspiracy (U.S. Br. 16). And while the Government is correct that the CCE offense is more serious than a so-called "simple" drug conspiracy (U.S. Br. 16-17), Congress provided for the added seriousness of the CCE offense by including stiffer sentences in § 848. If anything, the serious nature of CCE might have prompted Congress to authorize the pyramiding of sentences — which it clearly knows how to do. See, e.g., 18 U.S.C. § 924(c)(1). But the Government concedes that Congress did not take that approach, and is left with the unlikely position that Congress intended on the one hand to permit dual convictions for CCE and conspiracy but on the other to prohibit courts from using those dual convictions as a basis for imposing lengthier prison terms or greater fines.

In the end, the Government resorts to arcane speculation, suggesting that Congress might have intended § 846 to operate as a sort of backup conviction in the event that a § 848 conviction was ever overturned for failure to prove beyond a reasonable doubt one of the elements that distinguishes § 848 from § 846. (U.S. Br. 20-21.) But the Government cannot establish that Congress ever gave a thought to this issue when it enacted the CCE statute, or that it has ever intentionally created any other similar "backup" offenses.

The fact remains that in *Jeffers* this Court asked "whether Congress intended to punish each statutory violation separately" and, after conducting an analysis that the Government does not challenge, "concluded that it did not." 432 U.S. at 155. This is definitive as to Congressional intent.

C. The Structure And History Of The CCE And Conspiracy Statutes Cannot Distinguish *Ball's* Holding That Judgments Of Conviction And Concurrent Sentences Are Cumulative Punishment Forbidden By The Fifth Amendment.

Jeffers and *Ball* mirror each other in their reasons for determining that Congress did not intend to punish the same conduct twice under the respective pairs of statutes at issue in those cases. The conclusion in *Jeffers* that Congress did not intend multiple punishments under the CCE and conspiracy statutes followed from the fact that both statutes were addressed to "the additional dangers posed by concerted activity." *Jeffers*, 432 U.S. at 157 (Opinion of Blackmun, J.); see also *Garrett*, 471 U.S. at 794 (approving *Jeffers* because "the dangers posed by a conspiracy and a CCE were similar"). Likewise, in *Ball*, the Court found that Congress did not intend cumulative punishments under the gun receipt and possession statutes at issue there because "[t]he independent but overlapping statutes simply are not 'directed to separate evils'." *Ball*, 470 U.S. at 864 (quoting *Albernaz v. United States*, 450 U.S. 333, 343 (1981)). The Government therefore faces a heavy burden in arguing that Congress intended to allow multiple judgments and concurrent sentences with respect to 21 U.S.C. §§ 846 and 848, even though Congress did not intend to allow such a result with respect to 18 U.S.C. §§ 922(h) and 1202(a). There is no direct evidence for this contention in the statutory language, the legislative history, or elsewhere. Moreover, none of the arguments that the Government offers as to the respective sets of statutes justifies the Government's attempt to impute diametrically opposed intentions to Congress with respect to the two sets of statutes.

The Government argues that the relevant drug statutes are different from the gun statutes on structural grounds (U.S. Br. 16-17), and suggests that because "Congress intended to create a distinct statutory offense when it created the CCE statute" it is "appropriate to presume that Congress intended to permit dual convictions with concurrent sentences for violation of the drug

conspiracy statute and the CCE offense." (U.S. Br. 17.) That is no distinction at all because 18 U.S.C. §§ 922(h) and 1202(a) are equally distinct offenses. In fact, this Court in *Ball* held that Congress did not intend to impose multiple judgments and concurrent sentences when possession of a gun was incidental to its receipt even though this Court recognized that "each substantive statute, in conjunction with its own sentencing provision, operates independently of the other." *Ball*, 470 U.S. at 860 (quoting *United States v. Batchelder*, 442 U.S. 114, 118 (1979)). The independence of the two statutes can justify the prosecution of both counts and the return of multiple guilty verdicts, but not the entry of dual judgments of conviction and the imposition of concurrent sentences.

Nor does the degree of overlap between 18 U.S.C. §§ 922(h) and 1202(a) provide any meaningful distinction between *Jeffers* and *Ball*. (See U.S. Br. 19-20). The overlap between those statutes is not as complete as the Government suggests. At least one other factual situation, which occurs far more often than a defendant manufacturing a gun (see U.S. Br. 19), will expose the defendant to conviction under § 1202(a) (possession) but not under § 922(h) (receipt): any time a person receives a gun before being convicted of a felony, and continues to possess the same gun after being convicted of a felony. Moreover, as Chief Justice Burger observed in *Ball*, §§ 922(h) and 1202(a) each apply to "substantial groups of people not covered by the other." 470 U.S. at 863, n.13. By comparison, the CCE-conspiracy overlap in this case is complete. "Every moment of [Rutledge's] conduct was as relevant to the [conspiracy] charge as it was to the [CCE] charge." *Garrett*, 471 U.S. at 787.⁷

⁷ The Government's contention that the manner in which Congress enacted § 1202(a) also does not distinguish *Ball* from *Jeffers*. (See U.S. Br. 20.) That the possession statute was passed pursuant to a late and supplemental Senate amendment simply is not the basis on which this Court in *Ball* concluded that multiple convictions and sentences are not permitted under the possession and (continued...)

Furthermore, the "practical concerns" over direct or collateral attack supposed by the Government do not justify treating judgments of conviction and concurrent sentences as not intended in the *Ball* situation but intended in the *Jeffers* situation. (See U.S. Br. 20-22.) The Government fails to show that there is, in fact, a high rate of success in direct or collateral attacks on CCE convictions. This is hardly surprising, since showing a high reversal rate in CCE cases would suggest that too often prosecutors are either charging too aggressively or prosecuting these cases in an improper manner. In fact, many challenges are not successful, and of those that are, only successful challenges to the sufficiency of the evidence are likely to lead to outright reversals of CCE convictions; others will lead to retrials. See Section II, below. The Government's "practical concerns," therefore, are largely illusory; ultimately, judicious use of the serious CCE charge by prosecutors is the best protection for the problems of which the Government complains.

Moreover, since a CCE conviction requires proof of a substantive drug offense in addition to the special CCE elements that completely subsume a conspiracy offense, *vacatur* of the CCE conviction will leave intact the conviction and sentence for the substantive offense, to which the Government is entitled under *Garrett*, 471 U.S. at 795, without violating the Double Jeopardy Clause. There is, therefore, no threat of a felon going free in any event.

Finally, the Government understates the degree to which it is possible to prevail in a challenge of a receipt conviction under § 922(h) while failing to prevail on a similar challenge to a possession conviction under § 1202(a), or vice versa. The success

of the one challenge may well imply the success of the other in cases where the alleged error is based on the evidence admitted at trial. Even there, however, evidence of receipt while a felon could be improperly admitted, thus requiring *vacatur* of a receipt conviction, even though the evidence of possession while a felon was perfectly sound. In addition, the viability of a purely legal challenge to one of the two gun-related convictions — based, for example, on jury instructions, irregularities in the indictment, or the like — simply does not imply that there are viable grounds for overturning the other gun-related conviction. The difference, if there is any, in the prospects for successful direct or collateral attack in the *Ball* context and the *Jeffers* context cannot justify the differing readings of Congressional intent that the Government proposes.

In sum, there is no basis for concluding that the scope of impermissible cumulative punishment was intended to be any different as to 21 U.S.C. §§ 846 and 848 than it was as to 18 U.S.C. §§ 922(h) and 1202(a). *Ball* held that the Double Jeopardy Clause prohibits multiple convictions and concurrent sentences with respect to the latter offenses. That conclusion equally is compelled here given the determination in *Jeffers* that Congress did not intend cumulative punishment for the same conduct under the conspiracy and CCE statutes. Accordingly, this case should be remanded to the district court with directions to vacate Rutledge's judgment of conviction for either the conspiracy or the CCE offense and the corresponding sentence.

II. A COMBINED CONVICTION AND SENTENCE ON THE CCE AND CONSPIRACY COUNTS WOULD ALSO VIOLATE THE FIFTH AMENDMENT.

The Government suggests in the alternative that this Court follow the Second Circuit's approach of entering a combined judgment on both the conspiracy and the CCE convictions with a single sentence for both. See U.S. Br. 24-26, citing *United States v. Aiello*, 771 F.2d 621, 632-35 (2d Cir. 1985). The Second

^{2/} (...continued)

receipt statutes. That conclusion proceeded from the determination that the two statutes defined the same offense and were directed to the same problem. *Ball*, 470 U.S. at 860-62. Likewise, in *Jeffers* and *Garrett*, this Court concluded that the CCE and conspiracy statutes both are directed to the additional dangers posed by concerted activity. *Jeffers*, 432 U.S. at 157; *Garrett*, 471 U.S. at 759.

Circuit's technique impermissibly results in the entry of judgment of conviction on both the CCE and the conspiracy counts, notwithstanding that court's attempt to circumvent the problem by labeling the district court's action as entering a "single" sentence on judgments that have been "combined." The fictional combined judgment does nothing to vitiate the Double Jeopardy Clause violation inherent in the act of entering judgment on both of the cumulative verdicts. If the judgment of conviction reflects conviction for both the CCE and the conspiracy offenses, it does not matter (except, perhaps, as to the number of assessments under 18 U.S.C. § 3013) whether those convictions are recorded on a single line as part of one count, or on two lines as two separate counts. There is in any event only a single document recording the judgment in a criminal case, which reflects all the charges on which a judgment of conviction has been entered. Fed. R. Crim. P. 32(b)(1). In violation of the Double Jeopardy Clause, the Second Circuit permits the recording by criminal judgment of multiple convictions on both the conspiracy and the CCE offense.

The Government's professed concern with the consequences of appeal and collateral attack lack merit, first because the Government assigns costs of, and responsibility for, error to the wrong party, and second, because these consequences are not nearly as severe as the Government urges. A successful appeal or collateral attack usually means that the Government, through no fault of the defendant, has erred in its prosecution, or that the trial court, through no fault of the defendant, has erred in its conduct of the trial, or both, and that the error is sufficiently severe and harmful to upset the conviction. The defendant is not the source of those errors, and should not be the one to be burdened by them. Surely defendants cannot be made to purchase, with a portion of their Fifth Amendment rights, insurance for the Government against its own errors.

Contrary to the Government's contention, a successful appeal or collateral challenge does not mean that the defendant will "escape

without conviction or punishment." (U.S. Br. 30.) The law is settled that, with very limited exceptions, the Government has the power to retry the defendant after a successful appeal or collateral attack. *United States v. Ball*, 163 U.S. 662, 671-72 (1896) (direct appeal); *United States v. Tateo*, 377 U.S. 463, 466 (1964) (collateral attack). The primary exception to this rule permitting retrial is a ruling that the Government failed to establish guilt beyond a reasonable doubt; it should surprise no one that retrial is not permitted in that circumstance. *Burks v. United States*, 437 U.S. 1, 16-18 (1978).⁴ The Government deserves no more protection from its own errors than is provided by its right to seek a new conviction after a meritorious appeal or collateral challenge.

Finally, the Government also suggests, albeit with little enthusiasm, the possibility of staying the entry of judgment and sentence on one of the cumulative counts, and allowing judgment and sentence to be entered if the defendant ever prevails in a challenge to the conviction and sentence actually entered. (See U.S. Br. 26-29.) In its present posture, this case does not raise the question of whether the cumulative judgment and sentence could be stayed for entry later if a challenge to the judgment that was entered proves successful.

Moreover, the Government has not demonstrated that there exists in practice any real problem with respect to challenges to CCE convictions. The Government has not cited a single case in which a CCE conviction was overturned for insufficient evidence

⁴ Even in the circumstance that a subsequent challenge to a CCE conviction has established that the Government failed to prove beyond a reasonable doubt some element that CCE does not share with conspiracy, so that an accompanying conspiracy conviction would have survived, there is authority for the proposition that the Government could retry its conspiracy charge if necessary. See *Beverly v. Jones*, 854 F.2d 412 (11th Cir. 1988) (holding that Alabama could retry defendant on lesser included charge of first degree murder where conviction on greater charge of murder while committing robbery was reversed for failure to prove the robbery element beyond a reasonable doubt), cert. denied, 490 U.S. 1082 (1989).

on an element unique to CCE. Our research has revealed very few, and none in which serious problems arose. In *United States v. Ward*, 37 F.3d 243, 251 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 1388 (1995), upon reversal of the CCE conviction the defendant acquiesced in the reinstatement of the guilty verdict on the conspiracy charge, which had been vacated rather than entered by the district court. *United States v. Witek*, 61 F.3d 819, 825 & n.8 (11th Cir. 1995), and *United States v. Delgado*, 4 F.3d 780, 782 (9th Cir. 1993), do not disclose the manner in which the district courts addressed the dual guilty verdicts, but CCE reversals were accompanied by affirmances of conspiracy convictions. See also *United States v. Silvers*, 888 F. Supp. 1289, 1305-09 (D. Md. 1995) (describing the "combined" conviction as a "legal legerdemain" but holding that a vacated conspiracy sentence can be reinstated if the CCE conviction is overturned).

Under *Jeffers* and *Ball*, the Double Jeopardy Clause bars any approach that involves entering judgments and sentences on §§ 848 and 846 guilty verdicts that rest on the same conduct, either outright or in some "combined" or "alternative conditional" form. Beyond those limitations, Rutledge suggests that this Court permit the lower courts to address the propriety and effects of other alternatives as cases with this issue present themselves. Those courts will then have cases that put the matter at issue and the benefit of full briefing and argument. With the benefit of experience, the lower courts may come to agreement on a proper approach; if not, the additional experience will assist this Court in resolving the split below.

CONCLUSION

For the foregoing reasons, and those set forth in his opening brief, petitioner Tommy L. Rutledge respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit and remand with an order that the district court vacate his conviction and sentence under either Count 1 or Count 2 of the indictment.

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